Supreme Court, U.S.
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Supreme Court of the United States

KIRBY INLAND MARINE, INC. OF MISSISSIPPI, f/k/a BRENT TRANSPORTATION COMPANY, *in personam* and the M/V MISS DIXIE, its engines, tackle, fixtures and appurtenances, etc., *in rem*,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the *Oregon* presumption of fault (158 U.S. 186) should not be applied when a moving vessel strikes a stationary railroad bridge that was previously determined by the United States Coast Guard to be an unreasonable obstruction to navigation under 33 U.S.C. § 512 of the Truman-Hobbs Act and remained unaltered?

2. Whether a prior declaration by the United States Coast Guard that a railroad bridge, which was struck by a moving vessel, is an unreasonable obstruction to navigation in violation of 33 U.S.C. § 512 triggers application of the competing *Pennsylvania* presumption of fault (86 U.S. 125) since the statute violated involves marine safety and navigation?

PARTIES TO THE PROCEEDING AND DISCLOSURE STATEMENT

Petitioner

Petitioner is Kirby Inland Marine, Inc. of Mississippi, f/k/a Brent Transportation Company, *in personam*, the ultimate parent company of which is publicly traded, and its vessel the M/V MISS DIXIE, its engines, tackle, fixtures and appurtenances, etc., *in rem*. Kirby Inland Marine, Inc. of Mississippi's parent corporation is Kirby Inland Marine, L.P. whose parent corporation is Kirby Corporation. Petitioner is unaware of any publicly held company owning ten (10%) percent or more of Kirby Corporation's stock. Kirby Inland Marine, Inc. of Mississippi and the M/V MISS DIXIE were the defendants in the District Court and the Appellees before the Eighth Circuit Court of Appeals.

Respondent

Respondent is the Union Pacific Railroad Company of Delaware, which is not a publicly traded company. The Union Pacific Corporation is a publicly traded company owning more than ten percent (10%) of the stock of Union Pacific Railroad Company. The Union Pacific Railroad Company was the Plaintiff in the District Court and the Appellant before the Eighth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of *Certiorari* to review the judgment and order of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, which reversed in part and affirmed in part the decision of the District Court is reported at 296 F.3d 671 (8th Cir. 2002) and is in Appendix A. The decision of the District Court for the Southern District of Iowa, Davenport Division, is reported at 2001 WL 1689710 and 2001 A.M.C. 2857 and is in Appendix B. The decision of the Court of Appeals denying the petition for rehearing and in the alternative a rehearing *en banc* is contained in Appendix C.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on July 11, 2002. The Court of Appeals entered an Order denying a timely petition for rehearing *en banc* and, alternatively, for a rehearing by the panel on August 15, 2002.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

33 U.S.C. § 401. Construction of bridges, causeways, dams or dikes generally; exemptions

It shall not be lawful to construct or commence the construction of any bridge, causeway, dam, or dike over or in any port, roadstead, haven, harbor, canal, navigable river,

or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for (1) the bridge or causeway shall have been submitted to and approved by the Secretary of Transportation, or (2) the dam or dike shall have been submitted to and approved by the Chief of Engineers and Secretary of the Army. However, such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Secretary of Transportation or by the Chief of Engineers and Secretary of the Army before construction is commenced. When plans for any bridge or other structure have been approved by the Secretary of Transportation or by the Chief of Engineers and Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless modification of said plans has previously been submitted to and received the approval of the Secretary of Transportation or the Chief of Engineers and the Secretary of the Army. The approval required by this section of the location and plans or any modification of plans of any bridge or causeway does not apply to any bridge or causeway over waters that are not subject to the ebb and flow of the tide and that are not used and are not susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.

33 U.S.C. § 512. Obstruction of navigation

No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States.

33 U.S.C. § 513. Notice, hearings, and findings

Whenever any bridge shall, in the opinion of the Secretary, at any time unreasonably obstruct such navigation, it shall

be the duty of the Secretary, after notice to interested parties, to hold a hearing at which the bridge owner, those interested in water navigation thereunder or therethrough, those interested in either railroad or highway traffic thereover, and any other party or parties in interest shall have full opportunity to offer evidence and be heard as to whether any alteration of such bridge is needed, and if so what alterations are needed, having due regard to the necessity of free and unobstructed water navigation and to the necessities of the rail or highway traffic. If, upon such hearing, the Secretary determines that any alterations of such bridge are necessary in order to render navigation through or under it reasonably free, easy, and unobstructed, having due regard also for the necessities of rail or highway traffic thereover, he shall so find and shall issue and cause to be served upon interested parties an order requiring such alterations of such bridge as he finds to be reasonably necessary for the purposes of navigation.

33 U.S.C. § 514. Submission and approval of general plans and specifications

After the service of an order under this subchapter, it shall be the duty of the bridge owner to prepare and submit to the Secretary of Transportation, within a reasonable time as prescribed by the Secretary, general plans and specifications to provide for the alteration of such bridge in accordance with such order, and for such additional alteration of such bridge as the bridge owner may desire to meet the necessities of railroad or highway traffic, or both. The Secretary may approve or reject such general plans and specifications, in whole or in part, and may require the submission of new or additional plans and specifications, but when the Secretary shall have approved general plans and specifications, they shall be final and binding upon all parties unless changes therein be afterward approved by the Secretary and the bridge owner.

33 U.S.C. § 516. Apportionment of cost

At the time the Secretary shall authorize the bridge owner to proceed with the project, as provided in section 515 of this title, and after an opportunity to the bridge owner to be heard thereon, the Secretary shall determine and issue an order specifying the proportionate shares of the total cost of the project to be borne by the United States and by the bridge owner. Such apportionment shall be made on the following basis: The bridge owner shall bear such part of the cost as is attributable to the direct and special benefits which will accrue to the bridge owner as a result of the alteration, including the expectable savings in repair or maintenance costs; and that part of the cost attributable to the requirements of traffic by railroad or highway, or both, including any expenditure for increased carrying capacity of the bridge, and including such proportion of the actual capital cost of the old bridge or of such part of the old bridge as may be altered or changed or rebuilt, as the used service life of the whole or a part, as the case may be, bears to the total estimated service life of the whole or such part: *Provided,* That in the event the alteration or relocation of any bridge may be desirable for the reason that the bridge unreasonably obstructs navigation, but also for some other reason, the Secretary may require equitable contribution from any interested person, firm, association, corporation, municipality, county, or State desiring such alteration or relocation for such other reason, as a condition precedent to the making of an order for such alteration or relocation. The United States shall bear the balance of the cost, including that part attributable to the necessities of navigation: *And provided further,* That where the bridge owner proceeds with the alteration on a successive partial bid basis the Secretary is authorized to issue an order of apportionment of cost for the entire alteration based on the accepted bid for the first part of the alteration and an estimate of cost for the remainder of the work. The Secretary is authorized to revise the order of apportionment of cost, to the extent he deems reasonable and proper, to meet any changed conditions.

33 U.S.C. § 519. Noncompliance with orders; penalties; removal of bridge

Any bridge owner who shall willfully fail or refuse to comply with any lawful order of the Secretary, made in accordance with the provisions of this subchapter, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished in any court of competent jurisdiction by a fine not exceeding $5,000, and every month such bridge owner shall remain in default shall be deemed a new offense and subject such bridge owner to additional penalties therefore. In addition to the penalties above prescribed the Secretary may, upon the failure or refusal of any bridge owner to comply with any lawful order issued by the Secretary in regard thereto, cause the removal of any such bridge and accessory works at the expense of the bridge owner; and suit for such expense may be brought in the name of the United States against such bridge owner and recovery had for such expense in any court of competent jurisdiction. The removal of any bridge erected or maintained in violation of the provisions of this subchapter or the order or direction of the Secretary made in pursuance thereof, and compliance with any order of the Secretary made with respect to any bridge in accordance with the provisions of this subchapter, may be enforced by injunction, mandamus, or other summary process upon application to the district court of any district in which such bridge may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States at the request of the Secretary.

33 C.F.R. § 116.01 General

(a) All bridges are obstructions to navigation and are tolerated only as long as they serve the needs of land transportation while allowing for the reasonable needs of navigation.

(b) This part describes the general procedures by which the U.S. Coast Guard determines a bridge to be an unreason-

able obstruction to navigation and issues an Order to Alter under the authority of the following statutes, as appropriate: Section 18 of the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. 502; Section 4 of the Bridge Act of 1906, 33 U.S.C. 494; or the Truman-Hobbs Act of 1940, as amended, 33 U.S.C. 511-524.

(c) A bridge constructed across a navigable water of the United States shall not unreasonably obstruct the free navigation of the water over which it was constructed, either due to insufficient height or width of the navigation span, or because of difficulty in passing through the draw opening. If any bridge unreasonably obstructs navigation, the Commandant, U.S. Coast Guard, will order the alteration of that bridge. Alterations may include structural changes, replacement, or removal of the bridge.

(d) Whenever the Coast Guard has good reason to believe that a bridge across any of the navigable waters of the United States is an unreasonable obstruction to navigation, the Coast Guard will give notice to the owner of the bridge and other interested parties, and hold a public hearing at which the interested parties will have a full opportunity to be heard and to offer evidence on the question of whether alterations to the bridge are necessary and, if so, the extent of alterations needed.

(e) If the Coast Guard determines that alterations to a bridge are necessary, the Commandant, U.S. Coast Guard, will issue to the bridge owner an Order to Alter containing details of the alterations necessary to render navigation through or under the bridge reasonably free, easy, and unobstructed.

(1) In the case of a railroad or publicly owned highway bridge, an Order to Alter is issued to the bridge owner under the provisions of the Truman-Hobbs Act (33 U.S.C. 511 et seq.). In ordering these alterations, the Coast Guard will give due regard to the necessities of free and unobstructed navigation and of rail and highway traffic. For alterations to bridges governed by the Truman-Hobbs Act, the Coast Guard must approve general plans, specifications, and contracts for the alteration project, as well as

approving the apportionment of the total cost of the alterations between the United States and the bridge owner.

(2) For all other bridges, the Order to Alter will contain the required alterations for the bridge and will prescribe a reasonable time in which to accomplish the required alterations. The bridge owner is responsible for the entire cost of the required alterations.

33 C.F.R. § 116.10 Preliminary review

(a) Upon receipt of a written complaint, the District Commander will review the complaint to determine if, in the District Commander's opinion, the complaint is justified and whether a Preliminary Investigation is warranted.

(1) The District Commander's opinion as to whether or not the complaint warrants a Preliminary Investigation will be formed through informal discussions with the complainant, users of the affected waterway, the owner of the bridge, and other interested parties.

(2) In forming an opinion, the District Commander may also review the district files, records of accidents, and details of any additional written complaints associated with the bridge in question.

(b) In the absence of any written complaint, the District Commander may decide, based on a bridge's accident history or other criteria, to conduct a Preliminary Investigation.

(c) The District Commander will inform the complainant and the Chief, Office of Bridge Administration of the determination of any Preliminary Review. If the District Commander decides that the bridge in question is not an unreasonable obstruction to navigation, the complainant will be provided with a brief summary of the information on which the District Commander based the decision and will be informed of the appeal process described in § 116.55. There will be no further investigation, unless additional information warrants a continuance or reopening of the case.

33 C.F.R. § 116.15 Preliminary investigation

(a) During the Preliminary Investigation, the District Commander will prepare a written report containing all pertinent information and submit the report, together with a recommendation for or against the necessity of a Detailed Investigation, to the Chief, Office of Bridge Administration.

(b) The Preliminary Investigation Report will include a description of the nature and extent of the obstruction, the alterations to the bridge believed necessary to meet the reasonable needs of existing and future navigation, the type and volume of waterway traffic, and a calculation of the benefits to navigation which would result from the proposed bridge alterations.

(c) The Chief, Office of Bridge Administration will review the Preliminary Investigation Report and make a Preliminary Decision whether or not to undertake a Detailed Investigation and a Public Hearing.

(d) If after reviewing the Preliminary Investigation Report, the Chief, Office of Bridge Administration decides that further investigation is not warranted, the complainant will be notified of the decision. This notification will include a brief summary of information on which the decision was based and details of the appeal process described in § 116.55.

33 C.F.R. § 116.20 Detailed investigation

(a) When the Chief, Office of Bridge Administration determines that a Detailed Investigation should be conducted, the District Commander will initiate an investigation that addresses all of the pertinent data regarding the bridge, including information obtained at a public hearing held under § 116.25. As part of the investigation, the District Commander will develop a comprehensive report, termed the "Detailed Investigation Report", which will discuss: the obstructive character of the bridge in question; the impact of that bridge upon navigation; navigational benefits de-

rived; whether an alteration is needed to meet the needs of navigation; and, if alteration is recommended, what type.

(b) The District Commander will forward the completed Detailed Investigation Report to the Chief, Office of Bridge Administration for review together with a recommendation of whether the bridge should be declared an unreasonable obstruction to navigation and, if so, whether an Order to Alter should be issued.

33 C.F.R. § 116.25 Public Hearings

(a) Any time the Chief, Office of Bridge Administration determines that a Detailed Investigation is warranted, or when Congress declares a bridge unreasonably obstructive, the District Commander will hold a public hearing near the location of the bridge to provide the bridge owner, waterway users, and other interested parties the opportunity to offer evidence and be heard, orally or in writing, as to whether any alterations are necessary to provide reasonably free, safe, and unobstructed passage for waterborne traffic. The District Commander will issue a public notice announcing the public hearing stating the time, date, and place of the hearing.

(b) When a bridge is statutorily determined to be an unreasonable obstruction, the scope of the hearing will be to determine what navigation clearances are needed.

(c) In all other cases, the scope of the hearing will be to address issues bearing on the question of whether the bridge is an unreasonable obstruction to navigation and, if so, what alterations are needed.

(d) The hearing will be recorded. Copies of the public hearing transcript will be available for purchase from the recording service.

STATEMENT OF THE CASE

The facts of this case are uncomplicated and undisputed. On May 5, 1996, Kirby Inland Marine, Inc. ("Kirby") was the owner and operator of the M/V Miss Dixie, a river barge towboat in operation on the Mississippi River near Clinton, Iowa. On May 5, 1996, the Union Pacific Railroad Company ("Union Pacific") was the owner of the Clinton Railroad Bridge, located on the Mississippi River at or near Mile 518.0 UMR, at Clinton, Clinton County, Iowa.

On May 5, 1996, the M/V Miss Dixie an/or its tow struck Union Pacific's Clinton Railroad Bridge causing damage to both the bridge and the M/V Miss Dixie and/or its tow. Union Pacific brought a lawsuit alleging that its bridge was damaged by the negligence of the crew of the M/V Miss Dixie and/or by the unseaworthiness of the vessel. The lawsuit was brought under the District Court's admiralty and maritime jurisdiction within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure. In response, Kirby denied its crew was negligent or that its vessel was unseaworthy and alleged that Union Pacific itself was negligent in the care and maintenance of the Clinton Railroad Bridge, and further alleged the defense of a set-off for damage sustained by the M/V Miss Dixie and/or its tow.

The Clinton Railroad Bridge was originally built in 1888 and modified in 1907. It was constructed in accordance with permits issued by the United States Coast Guard pursuant to 33 U.S.C. § 401. On the date of the allision, the bridge was operating under these permits.

However, a separate federal statute, the Truman-Hobbs Act, authorizes the United States Coast Guard to order bridge-owners to alter bridges when they "unreasonably obstruct the free navigation of any navigable waters of the United States." 33 U.S.C. § 512. The Truman-Hobbs Act further provides a mechanism for the owner of such a

bridge to share the expense of altering the bridge with the federal government. *See* U.S.C. §§ 516-518. On February 28, 1996, the Coast Guard issued an Order to Alter pronouncing the bridge to be an unreasonable obstruction to navigation.

The Clinton Railroad Bridge is the site of repeated allisions. On September 22, 1995, in a Detailed Report[1] on the obstructive character of the Clinton Bridge, the Commander of the Second United States Coast Guard District reported on its notorious history:

> [c]ollisions between the bridge and vessels have caused significant damage to both. Three hundred twenty eight collisions occurred between 1981 and 1991. The restrictive opening causes unreasonable delays to river traffic because significant reductions in speed are required to safely transit the bridge. Under ideal conditions, a time consuming transit at reduced speed is required. The hazards are exacerbated by high water, inclement weather conditions and the proximity of other riverfront facilities. In spite of frequent use helperboats and other precautions, contact with the bridge structure is commonplace and collision damage is prevalent. Excessive collisions and complaints from the river industry prompted the preliminary investigation of the bridge.
>
> [The Detailed Report] concludes that the bridge is an unreasonable obstruction to navigation because its horizontal opening is inadequate for modern commercial tow size and the physical condition of the river.

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[1] The Coast Guard's Order to Alter, the Detailed Report on the Obstructive Character of the Clinton Railroad Bridge, and the Decision Analysis are all part of an exhibit that was made a part of the parties' stipulated facts, which was filed before the District Court.

Moreover, the Detailed Report also states that:

> [t]he present bridge structure was constructed in 1907, consisting of three fixed truss spans and a 460 foot swingspan. The horizontal clearance in the channel swingspan is 177.5 feet. Since the bridge was constructed there have been significant changes to both the navigability of the Upper Mississippi River and the size, type, and character of the vessels that transit the bridge. Additional difficulties to navigation include a highway bridge constructed immediately upstream, along with development on both descending banks.

The Detailed Report also criticizes the poor position of the Clinton Bridge:

> It is positioned immediately below a bend in the river that makes it extremely difficult for tows to line up with the bridge on down bound transits. This is compounded by a severe cross current toward the Illinois bank that is difficult to compensate for and is exacerbated when Lock and Dam 13 is open.

Finally, the Detailed Report concluded as follows:

> Based upon this detailed report, the Clinton RR Bridge, Mile 518.0, Upper Mississippi River presents an unreasonable obstruction to navigation.

* * * *

1. A horizontal clearance of 177.5 feet is roughly half the clearance of the authorized Corps of Engineers channel width of 300 feet. The horizontal clearance provided is not adequate for the standard 105 foot width of the tows.

2. When the bridge was originally built in 1888 and modified in 1907 it was conditional on the rebuilding of the bridge when required by navigational interests.

> The Second [Coast Guard] District considers the Clinton RR Bridge a hazard to navigation, an opinion which the Navigational Benefits support. From a navigational standpoint, the Upper Mississippi River commercial users would be best served by a Clinton RR Bridge which would provide a properly located horizontal opening of at least 300 feet.

Subsequent to the Detailed Report, on November 30, 1995, the Chief of the U.S. Coast Guard's Office of Bridge Administration approved a Decision Analysis concerning the navigation problems created by the Clinton Railroad Bridge. Among the many findings of the Decision Analysis, the Coast Guard states:

> The Sabula Railroad Drawbridge does not affect navigation at the Clinton Railroad Drawbridge. However, the pier configuration of the Clinton Highway Bridge and its close proximity to the Clinton Drawbridge does affect downstream navigation by not allowing a downbound tow to align properly with the current on its approach to the Clinton Drawbridge.

In addition, the Decision Analysis also stressed the significant changes that have taken place in the river transportation industry during the past ninety-four years since the bridge was constructed:

> When the Clinton Drawbridge was originally built, the average tow consisted of four to five wooden barges, powered by an 1800 horsepower wooden towboat. Today, commercial tows are significantly larger, heavier, and carry more cargo than the older and smaller wooden boats, which used the river when the Clinton Drawbridge was initially constructed. An average tow using the UMR [Upper Mississippi River] consists of 15 steel barges, powered by a 3200 to 4800 horsepower steel towboat. A typical barge measures 195 feet long by 35 feet wide. Barges in tows are usually arranged 5 long

and 3 wide. A typical towboat (without barges) is 150 feet long and 40 feet wide and when coupled with its barges has an overall dimension of approximately 1200 feet long and 105 feet wide. Modern tows are more than twice the length of the earlier commercial tows that operated in the area. An average of 20,135,250 tons of cargo per year are transported past this bridge. These cargoes consist primarily of grain, coal, and petroleum products.

According to the Decision Analysis Summary:

2. The restricted channel width, position of the bridge, shallow water depths near the bridge, severe cross currents and proximity of the Clinton (U.S. Route 30) Highway Bridge all combine to pose serious problems in getting aligned for the bridge approach even for the most experienced pilots.

3. During periods of high water the narrow horizontal opening of the bridge makes it virtually impossible for tows to transit the bridge without contacting the bridge piers or protective cells.

In his Order to Alter, because the Clinton Railroad Bridge was deemed to present an unreasonable obstruction to navigation, the Commandant of the Coast Guard directed the Union Pacific to alter the bridge such that:

1. The moveable span shall provide a horizontal clearance of no less than 300 feet measured normal to the channel and a vertical clearance of no less than 52 feet above the two percent flowline or 60 feet above normal pool, whichever is greater, in the open position. These clearances are necessary for the reasonable needs of navigation.

Based upon the Coast Guard's Order to Alter, the District Court found that the *Oregon* presumption of fault (158 U.S. 186) in favor of the bridge had been overcome and, further-

more, that the *Pennsylvania* rule's presumption of fault (86 U.S. 125) resulting from the violation of 33 U.S.C. § 512, applied against the railroad. On appeal, the Eighth Circuit Court of Appeals disagreed, finding that a violation of 33 U.S.C. § 512 was not sufficient to overcome the *Oregon* presumption. This Petition for Writ of *Certiorari* followed.

REASONS FOR GRANTING THE PETITION

I. *Certiorari* should be granted because the decision of the Eighth Circuit Court of Appeals conflicts with a decision of the Seventh Circuit Court of Appeals on an important issue.

The issue presented by this Petition is of critical importance to both the marine and railroad industries. The decision of *Union Pacific Railroad Company v. Kirby Inland Marine, Inc.*, 296 F.3d 671 (8th Cir. 2002) creates a troublesome inconsistency in the application of century-old maritime law that applies to vessel-bridge collisions, which are known as allisions in admiralty law, on our nation's navigable waterways, in general, and the Mississippi River, in particular. The confusion arises because the holding directly conflicts with another recent decision that was made by the neighboring Seventh Circuit Court of Appeals, *I&M Rail Link, LLC v. Northstar Navigation, Inc.*, 198 F.3d 1012 (7th Cir. 2000), which involved similar facts.[2] In short, the two appellate courts disagree on the meaning and significance of 33 U.S.C. § 512, which is contained within the Truman-Hobbs Act, 33 U.S.C. §§ 511-23. Furthermore, these two decisions have created an irreconcilable conflict of law that significantly impacts the marine and railroad industries, as well as navigable waterways throughout this country.

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[2] The Eighth Circuit Court of Appeals described the *I&M* case as "strikingly similar." *Union Pacific*, 296 F.3d at 677.

More specifically, the *Union Pacific* decision reflects an interpretation of the Act, including 33 U.S.C. § 512, which was flatly rejected in *I&M*. The Court of Appeals for the Eighth Circuit found that:

> Looking at the Truman-Hobbs Act as a whole, a § 512 finding that a bridge is an 'unreasonable obstruction to navigation' is not a direct comment on the safety of the bridge. Instead, the Coast Guard labels a bridge an unreasonable obstruction in order to facilitate the funding process.

Union Pacific, 296 F.3d at 675.

In stark contrast, while the Seventh Circuit Court of Appeals acknowledged the obvious funding aspects of the Act, it forcefully rejected the view that the Act was *only* a funding procedure. In the words of Judge Easterbrook:

> But [funding] is not *all* the Act does. Section 512 forbids maintenance of a bridge that has become an unreasonable obstruction, and § 519 imposes civil and criminal penalties on bridge owners that fail to comply with a renovation order. What is more—and what is more important—the Act supplies funding *only if* a bridge has become an unreasonable obstruction to navigation. I&M treats the unreasonable-obstruction finding as a matter of form, a kind of administrative wink and nudge needed to liberate public funds. But we have no reason to think that Congress contemplated fraudulent findings; both the structure of the Act and the evident seriousness with which the Coast Guard takes its task show that public funds are available only if the bridge *really is* an unreasonable obstruction to navigation.

I&M, 198 F.3d at 1014-1015. (Emphasis in the original).

Consistent with its view that 33 U.S.C. 512 is not a meaningless provision of a larger funding procedure, *I&M* also found that:

> 33 U.S.C. 512, which provides that no bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States, applies to all bridges, not just those built without permits.

Id. at 1013.

Accordingly, in the Seventh Circuit, a Coast Guard finding that a bridge is an unreasonable obstruction to navigation is a direct comment on the safety of the bridge and 33 U.S.C. § 512 imposes an affirmative duty on all bridge-owners not to unreasonably obstruct navigation. The Seventh Circuit Court of Appeals clearly affords a vibrancy to 33 U.S.C. § 512 outside the larger Truman-Hobbs Act.

The conflicting decision of the Eighth Circuit Court of Appeals effectively means that there is currently one interpretation of 33 U.S.C. § 512 for the east bank of the Mississippi River and another for the west. Such a difference of opinion may not have been of exceptional importance if the cases involved issues solely involving land-based parties. However, 33 U.S.C. § 512 inherently involves vessels and their navigation through bridges that physically connect the two judicial circuits. Therefore, the current split will result in the proverbial race to the courthouse following allisions along the Mississippi River. Bridge and vessel interests will respectively head to courts in different circuits to file suit against each other to recover for their damages.

In the present case, which involves an allision between the M/V Miss Dixie and the Clinton, Iowa Railroad Bridge, the District Court initially applied a presumption of negligence against the vessel owner, Kirby. *Union Pacific v. Kirby*, 2001 WL 1689710 *1, 2001 A.M.C. 2857, 2258 (S.D.IA.). Indeed, pursuant to Supreme Court precedent, under certain circumstances, a presumption of fault can arise against a moving vessel when it makes contact with a stationary bridge. *The Oregon,* 158 U.S. 186, 15 S.Ct. 804

(1895). However, the District Court found that at the time of the occurrence, the bridge was in direct violation of a federal statute, 33 U.S.C. § 512, which is part of the Truman-Hobbs Act and expressly forbids any bridge from unreasonably obstructing navigation. *Id.*

The District Court's ruling that the bridge was in violation of federal law, 33 U.S.C. § 512, was based on the Coast Guard's Order to Alter, which was admitted into evidence under Federal Rule of Evidence 803(8)(c). *Id.* at 2. The Coast Guard issued the Order to Alter on February 28, 1996. *Id.* at 1. In short, the District Court found that the Union Pacific's bridge was an unreasonable obstruction to navigation and that Kirby had thereby "overcome" the *Oregon* presumption. *Id.* at 1-2.

Furthermore, the District Court also made reference to another longstanding principle of maritime law, again established by the Supreme Court. In the words of the District Court, "where any party violates a statutory or regulatory rule designed to prevent collisions, that party has committed *per se* negligence and under the *Pennsylvania* rule, has the burden of proving that its statutory fault was not a contributing cause of the accident." *Id. citing The Pennsylvania*, 19 U.S. 125, 136, 22 L.Ed. 148 (1873). In light of the fact that the bridge was found to be in violation of 33 U.S.C. § 512, a statute or regulatory rule relating to safety and navigation, the District Court correctly found that a presumption of negligence applied against the bridge-owner. *Id.* at 2, *citing Illinois Constructors Corp. v. Logan Transp., Inc.*, 715 F.Supp. 872, 879 (N.D.Ill. 1989).

By choosing not to follow the District Court's decision, the Eighth Circuit Court of Appeals created a disparity of law between it and the Seventh Circuit Court of Appeals involving important questions arising out of the interaction of two landmark United States Supreme Court decisions, *The Oregon* and *The Pennsylvania,* and the interplay be-

tween their competing presumptions of fault; and 33 U.S.C. § 512 and the remainder of Truman-Hobbs Act. As a result, whether the Eighth or Seventh Circuit Court of Appeals' interpretation of 33 U.S.C. § 512 is correct has serious consequences for the litigants as well as all marine and railroad transportation companies similarly situated.

In this regard, if 33 U.S.C. § 512 actually means what it says and thereby imposes an affirmative duty on all bridge-owners not to unreasonably obstruct navigation, as found by *I&M* and numerous lower courts,[3] then the District Court was correct when it found that Kirby had overcome the *Oregon* presumption. In addition, the Seventh Circuit Court of Appeals' reasoning in *I&M* also supports the District Court's application of the *Pennsylvania* rule in favor of Kirby or, at the very least, the elimination of any presumption in favor of either party.

As this Court has noted, a principal purpose for which *certiorari* jurisdiction is used is to resolve conflicts among the United States courts of appeals concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344, 347, 111 S.Ct. 1854, 1857 (1991). Here, the *Union Pacific* and *I&M* decisions regarding the meaning of 33 U.S.C. § 512 are irreconcilable. Accordingly, the Petitioner's Writ of *Certiorari* should be granted.

Furthermore, interpretation of the relevant federal statute and the general application of a presumption in favor of either bridges or vessels is an exceptionally important matter considering the importance of vessel and rail traffic and the number of allisions that occur with Truman-Hobbs

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[3] *Nassau County Bridge Authority v. Tug Dorothy McCallister*, 207 F.Supp. 167 (E.D.N.Y. 1962); *Board of Commissioners v. Gypsum Transportation, Ltd.*, 263 So.2d 385, 1972 A.M.C. 2594 (La. Ct. of Appeals, 4th Dist. 1972); and *Connecticut v. Tug Cynthia Moran*, 607 F.Supp. 24 (D.C.Conn. 1984).

Act bridges. For example, according to the Coast Guard, the Clinton, Iowa railroad bridge, which is just one of many Truman-Hobbs designated bridges along the Mississippi River, was struck three hundred and twenty-eight (328) times between 1981 and 1991. To the railroad and marine transportation industries, this issue, which involves waterways and bridges trafficked by commercial vessels throughout the United States, is of exceptional importance and has implications far beyond the instant facts, which justifies the exercise of this Court's discretionary jurisdiction.[4]

II. *Certiorari* should be granted because the decision of the Eighth Circuit Court of Appeals is wrong.

A. The *Oregon* presumption is inapplicable.

The federal government has long been ordering the removal and alteration of unreasonable obstructions to navigation. Indeed, the Historical Notes following 33 U.S.C. § 511 (1986) direct our attention to 1952 U.S. Code Cong. and Adm. News, p. 2294. Attached to the report from Congress that is found at this citation is a letter from the then Secretary of the Army, Frank Pace, Jr., which clearly establishes that the federal government was ordering the elimination of unreasonable obstructions to navigation well before the federal funding of bridge renovations was made available. *Id.* at 2297-2298.

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[4] Kirby notes that the railroad interests have also expressed their desire to have this Court settle this important issue. In this regard, the railroad interests filed a petition for *certiorari* after the Seventh Circuit Appellate Court issued its decision in *I&M*, however, said petition was denied. *See* 531 U.S. 917, 121 S.Ct. 276 (2000). Now that a conflicting Eighth Circuit Court of Appeals decision has been rendered, Kirby submits this reoccurring issue is ripe for Supreme Court review.

Interestingly, the present conflict between the circuits arises out of legislation that was drafted in response to another nearly century-old Supreme Court case. Indeed, it has been held in words equally applicable here:

> It must be remembered that the Truman-Hobbs Act was passed by Congress in response to a ruling by the U.S. Supreme Court that, under the General Bridge Act, the Secretary of War was authorized to require alteration of a bridge which he determined to be an unreasonable obstruction to navigation without compensating the bridge owner for the cost of the alteration work. *Union Bridge Co. v. Unites States*, 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523 (1907). In response, Congress passed the Truman-Hobbs Act which imposes on the Government the total cost incurred in the interest of navigation, with suitable apportionment of cost to the bridge owner covering special improvements to the benefit of the railroad . . . .

Burlington Northern Railroad, WAB Case No. 86-07 (June 30, 1986) (Member Dunn).

However, contrary to the Eighth Circuit Court of Appeals' findings, simply because the present location of the rule prohibiting unreasonable obstructions to navigation, 33 U.S.C. § 512, is in the middle of a more recent funding apportionment scheme does not change its original meaning. Indeed, federal funding through the Truman-Hobbs Act is still tethered to a factual finding that a particular bridge is an unreasonable obstruction to navigation. Thus, pursuant to the Coast Guard's Order to Alter, there can be no real dispute that the Clinton, Iowa Railroad Bridge really is an unreasonable obstruction to navigation.

The significance of violating § 512 is underlined by federal regulations. According to 33 C.F.R. § 116.01:

> All bridges are obstructions to navigation and are tolerated only as long as they serve the needs of land transportation while allowing for the reasonable needs of navigation.

Therefore, as a matter of law, the Clinton, Iowa Railroad Bridge is "intolerable" as it no longer allows for the reasonable needs of navigation.

Applying the *Oregon* presumption under such circumstances, as was done by the Eighth Circuit Court of Appeals, defies its original purpose. There are simply no other case decisions suggesting that this Court ever contemplated such a broad application of the *Oregon* presumption. Indeed, the very reason for presuming that a moving vessel is negligent when it strikes a stationary object is because "such accidents simply do not occur in the ordinary course of things unless the vessel has been mismanaged in some way." *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 795 (5th Cir. 1977) *citing Patterson Oil Terminals, Inc. v. The Port Covington*, 109 F.Supp. 953, 954 (D.C.PA. 1952). Considering the fact that Clinton, Iowa Railroad Bridge is "unreasonable" and "intolerable" for the purposes of modern navigation, it can hardly be said that vessels transiting beneath it are operating in "the ordinary course of things."

Moreover, admiralty courts are courts of equity. *See Vaughan v. Atkins*, 369 U.S. 527, 530, 82 S.Ct. 997, 999 (1962). In this regard, blindly applying the *Oregon* presumption in favor of a bridge, which has been found to be an unreasonable obstruction to navigation, and against a vessel transiting its span, defies all equitable principles of law. Accordingly, the Eighth Circuit Court of Appeals was wrong when it applied the *Oregon* presumption in favor of the Union Pacific.

B. The *Pennsylvania* rule applies in favor of Kirby.

In addition to finding the *Oregon* presumption inapplicable, the appellate court below should have applied the *Pennsylvania* rule in favor of Kirby. Applying the *Pennsylvania* rule would act to trump the *Oregon* presumption or, at the very least, level the playing field so that neither party enjoys a presumption. Under the latter scheme, Union Pacific would bear both the burden of proof and production just like any other plaintiff in a negligence action.

The Court of Appeals for the Eighth Circuit adopted a test for the application of the *Pennsylvania* rule used by the Seventh Circuit Court of Appeals in *Folkstone Mar. Ltd. v. CSX Corp.*, 64 F.3d 1037 (7th Cir. 1995). According to the *Folkstone* test:

> For the *Pennsylvania* rule to apply, three elements must exist: (1) proof by a preponderance of the evidence of violation of a statute or regulation that imposes a mandatory duty; (2) the statute or regulation must involve marine safety or navigation; and (3) the injury suffered must be of a nature that the statute or regulation was intended to prevent.

Id. at 1047.

While this test has three elements, the Eighth Circuit Court of Appeal's decision makes clear that the touchstone is the second element; the statute or regulation must involve marine safety or navigation. However, in its opinion, in spite of the fact that the test is in the alternative (i.e. safety *or* navigation), the appellate court solely discusses whether § 512 involves maritime *safety* and totally ignores the question of whether it involves *navigation*. The appellate court not only erred in its application of the safety requirement but also in failing to even consider the statute's obvious navigational aspects.

First, in regard to "safety," the *Union Pacific* court stated, "we find the Truman-Hobbs Act is a funding statute and not a safety statute." *Union Pacific,* 296 F.3d at 674. However, this conclusion is contrary to legislative history, modern day statements of Congress, and the federal regulations that govern the implementation of the Act.

In regard to legislative history, the Truman-Hobbs Act was passed in response to *Union Bridge Company v. United States*, 204 U.S. 364, 27 S.Ct. 367 (1907), which held that a government ordered alteration to an unreasonable obstruction to navigation did not amount to a taking of private property for public use. *See Burlington Northern Railroad*, WAB Case No. 86-07 (June 30, 1986); and 1952 U.S. Code Cong. and Adm.News, p. 2294-2298. In *Union Bridge*, this Court noted that the earliest legislation prohibiting the unreasonable obstruction of navigable waters appeared in 1884 at 23 Stat. at L. 133, 148, chap. 229.[5] *See Union Bridge*, 204 U.S. at 367. In relevant part, that original statute reads:

> That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now or hereafter to be constructed over any of the navigable waters of the United States . . . is an obstruction to the free navigation of such waters by reason of difficulty in passing the draw-opening or the raft span of said bridge by rafts steamboats, or other watercraft, it shall be the duty of the said Secretary on satisfactory proof thereof to require the company or person owning, controlling, or operating said bridge to cause such aids to the passage of said draw-opening or of said raft-span . . . to be constructed, placed, and maintained, at their own cost and expense, in the form of booms, dikes, piers, or

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[5] It should be noted that the 1884 statute actually predates *The Oregon*, 158 U.S. 186, 15 S.Ct. 804 (1895).

> other suitable and proper structures for the guiding of said rafts, steamboats, and other water-craft safely through said opening or span . . . .

In short, the original statute authorizing the government to order the alteration of unreasonable obstructions to navigation expressly states that its purpose was to provide for the safe passage of watercraft through said obstructions. Modern day statements of Congress regarding the Truman-Hobbs Act are consistent with the language found in the 1884 statute. Indeed, discussing the Truman-Hobbs Act, Congress recently explained, "the purpose of altering these bridges is to improve the safety of marine navigation under the bridge." H.R. Conf. Rep. No. 107-722, 107th Cong., 2d Sess. 40 (2002).

The federal regulations that govern the implementation of the Act also stress safety. In this regard, 33 C.F.R. § 116.25(a) states the following:

> The District Commander will hold a public hearing near the location of the bridge to provide the bridge owner, waterway users, and other interested parties the opportunity to offer evidence and be heard, orally or in writing, as to whether any alterations are necessary to provide reasonably free, safe, and unobstructed passage for waterborne traffic.

Accordingly, there can be no doubt that the Truman-Hobbs Act was drafted to maintain marine safety.

Second, with respect to "navigation", in addition to its own express terms, 33 U.S.C. § 512's relationship to navigation is also supported by its legislative history and its interpretation by the courts. In regard to legislative history, as discussed above, federal legislation has prohibited unreasonable obstructions to navigation long before the federal funding of bridge renovations was made available. *See* 1952 U.S. Code Cong. and Adm. News, p. 2294-2298. While fed-

eral funding may now be available to help alter a bridge, 33 U.S.C. § 512 still prohibits unreasonable obstructions in the interests of free navigation.

In addition, the limited legislative history that was cited by the Eighth Circuit Court of Appeals at 296 F.3d 674 relates only to the Truman-Hobbs Act's funding apportionment scheme and not the federal government's longstanding authority to order the removal and alteration of unreasonable obstructions to navigation. *See* H.R. Rep. No. 1447, 76th Cong., 1st Sess. 1-3 (1939). In fact, Report 1447 expressly states, "this bill leaves undisturbed the present law which requires the original bridge . . . to be reconstructed or altered on orden of the Secretary of War." *Id.* at 2. Accordingly, the appellate court's reliance on the history relating to the funding apportionment scheme was misplaced.

In regard to case law, in *Board of Commissioners v. Gypsum Transportation, Ltd.*, 263 So.2d 385, 390, 1972 A.M.C. 2594, 2601 (La. Ct. of Appeals, 4th Dist. 1972), it was held:

> Any bridge is an obstruction to the *free* navigation of a waterway, since it obviously restricts traffic in the waterway to the draw opening. This restriction is permitted because of the necessity of land transportation to commerce and convenience, but there must be a balance between the rights and the needs of land traffic and the paramount right to use of waterway by watercraft. This balance is achieved by prohibiting the *unreasonable* obstruction of navigation by a bridge. See 33 U.S.C. § 512.

(Emphasis in original). This reasoning is entirely consistent with the notion that the long-standing prohibition against unreasonable obstructions to navigation survives today in 33 U.S.C. § 512 despite the fact that it is found in the middle of the Truman-Hobbs Act.

Similarly, the Seventh Circuit Court of Appeals has held that:

> Admiralty law makes clear that a bridge may not unreasonably obstruct free navigation. Indeed, federal statutory law stipulates that bridges may not 'unreasonably obstruct the free navigation of any navigable waters.' 33 U.S.C. § 512.

Folkstone, 64 F.3d at 1048.

As neither of these two cases had anything to do with the funding of bridges, they are irreconcilable with the finding by the *Union Pacific* appellate court that the entirety of the Truman-Hobbs Act is a mere funding statute. In fact, there is no indication in *Folkstone* or *Gypsum* that those cases involved bridges that had been found to be unreasonable obstructions to navigation by the Coast Guard. Clearly, *Folkstone*, *Gypsum*, and *I&M* recognize that 33 U.S.C. § 512 is a safety and navigation statute that is applicable to all bridges, just like the navigation rules of the road are applicable to all vessels.

Finally, consistent with 33 U.S.C. § 512 being a safety and navigational statute, it has previously been cited as a basis for applying the *Pennsylvania* rule. Indeed, in *Nassau County Bridge Authority v. Tug Dorothy McAllister*, 207 F.Supp. 167, 171 (E.D.N.Y. 1962), a case involving an allision between a tug and a bridge, the court held that:

> Title 33 U.S.C.A §§ 494, 499, and 512 are applicable to the instant case. Violation of its statutory duty makes the bridge presumptively negligent and liable under the doctrine of *The Pennsylvania*, 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148.

In light of the statute's own terms, its legislative history, modern day statements of Congress, the regulations that govern its implementation, and its application by the courts, it is clear that 33 U.S.C. § 512 of the Truman-Hobbs

Act is *both* a navigation and safety statute. Accordingly, the appellate court below was mistaken in not finding that the touchstone element of the *Folkstone* test was satisfied.

With this second requirement satisfied, the remaining two elements fall into place. Turning to the first element of the *Folkstone* test, the Court of Appeals for the Eighth Circuit wrongly found that the Truman-Hobbs Act does not impose a specific duty because once the Coast Guard concludes that a bridge violates § 512, the bridge owner is "only required to prepare a plan for altering a bridge." *Union Pacific*, 296 F.3d at 675. However, this conclusion overlooks the enforcement powers provided to the federal government by statute and regulation.

As discussed above, once it was declared to be an unreasonable obstruction to navigation, the Clinton, Iowa Railroad Bridge was no longer an obstruction that could be "tolerated." 33 C.F.R. § 116.01(a). In addition, the Coast Guard will order the alteration of any bridge that unreasonably obstructs navigation. 33 C.F.R. § 116.01(c). Moreover, 33 U.S.C. § 519 sets out various noncompliance penalties, including:

> Any bridge owner who shall willfully fail or refuse to comply with any lawful order of the Secretary . . . shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished . . . by a fine not exceeding $5,000, and every month such bridge owner shall remain in default shall be deemed a new offense and subject such bridge owner to additional penalties therefore . . . Secretary may, upon failure or refusal of any bridge owner to comply with any lawful order issued . . . cause the removal of any such bridge and accessory works at the expense of the bridge owner . . . The removal of any bridge may be enforced by injunction [. . .] or other summary process.

The Seventh Circuit Court of Appeals recognized the specific duty imposed by these regulations and statutes in *I&M*, 198 F.3d at 1014. In the *I&M* case, it was found that the Truman-Hobbs Act forbade maintenance of a bridge that has become an unreasonable obstruction and to impose civil and criminal penalties on bridge-owners that fail to comply with a renovation order. *Id.* The decision of the Eighth Circuit Court of Appeals inexplicably failed to even acknowledge 33 U.S.C. § 519.

Based on the above, the Truman-Hobbs Act clearly imposes a greater duty than that found by the appellate court below. The duty is exactly what 33 U.S.C. § 512 states, "no bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States." The Union Pacific is in violation of this statute. The Eighth Circuit Court of Appeals therefore erred in failing to recognize the specific duty imposed by the Truman-Hobbs Act.

In regard to the third element of the *Folkstone* test, whether the Act was drafted to prevent a specific sort of injury, the appellate court was again improperly distracted by the subsequently adopted funding scheme. In this regard, the Court of Appeals for the Eighth Circuit mistakenly found that "although the bridge alterations may reduce the amount of allisions, this is a collateral consequence and not a direct purpose of the Truman-Hobbs Act." *Union Pacific*, 296 F.3d at 675.

However, as discussed above, according to Congress, "the purpose of altering these bridges is to improve the safety of marine navigation under the bridge." H.R. Conf. Rep. No. 107-722, 107th Cong., 2d Sess. 40 (2002). In this regard, an allision is the danger to marine traffic passing under a bridge that has been found to be an unreasonable obstruction to navigation.

In addition, the Coast Guard may conduct a Preliminary Investigation of a bridge for the purposes of determining whether it is an unreasonable obstruction to navigation based upon its accident history alone. 33 C.F.R. § 116.10(b). Most importantly, federal funding is only available after a factual finding has been made that the bridge is an unreasonable obstruction to navigation and an order to alter has been issued. Clearly, 33 U.S.C. § 512 was drafted to prevent a specific sort of injury, allisions. Accordingly, the *Folkstone* test is satisfied and the District Court correctly applied the *Pennsylvania* rule in favor of Kirby. Clearly, on appeal, the Eighth Circuit Court of Appeals reached the wrong decision when it rejected the District Court's conclusion and overlooked the various points discussed above, which are supported by the relevant law.

CONCLUSION

For all of the above reasons, the Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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APPENDIX A

296 F.3d 671
(Cite as: 296 F.3d 671)

United States Court of Appeals,
Eighth Circuit.

UNION PACIFIC RAILROAD COMPANY, Appellant,

v.

KIRBY INLAND MARINE, INC. OF MISSISSIPPI,
a/k/a/ Brent Transportation Company,
in personam and the M/V Miss Dixie,
its engines, tackle, fixtures and
appurtenances, etc., in rem, Appellees.

No. 01-3334.

Submitted: May 13, 2002.
Filed: July 11, 2002.
Rehearing and Rehearing En Banc Denied:
Aug. 15, 2002.

Before BOWMAN, BYE, Circuit Judges, and NANGLE,[1] Senior District Judge.

NANGLE, Senior District Judge. Appellant Union Pacific Railroad Company appeals from the district court's conclusions of law and final judgment in the instant case. For the reasons discussed below, we reverse in part and affirm in part the district court's opinion.

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[1] The HONORABLE JOHN F. NANGLE, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

I. Background

A. Background Facts

The parties stipulated to the following underlying facts. The Clinton Railroad Bridge (the "Clinton Bridge"), was constructed in 1907. Pursuant to 33 U.S.C. § 401, the construction of the Clinton Bridge was authorized by and constructed in accordance with permits issued by the United States Coast Guard. Appellant is the owner and operator of the Clinton Bridge.

Kirby Inland Marine, Inc. ("Kirby") is the owner and operator of the M/V MISS DIXIE, a river barge towboat in operation on the Mississippi River. On May 5, 1996, the M/V MISS DIXIE and/or its tow allided with the Clinton Bridge causing damage to the bridge and the M/V MISS DIXIE. On October 10, 1999, Appellant filed the instant action alleging the damage to its bridge was caused by the negligence of the crew of the M/V MISS DIXIE and/or by the unseaworthiness of that vessel. Appellees denied that the crew was negligent or that the vessel was unseaworthy and asserted that Appellant itself was negligent in the construction, design, care and maintenance of the Clinton Bridge.

To prove Appellant's negligence, Appellees proffered a Coast Guard's Order to Alter, issued on February 28, 1996, which found that the Clinton Bridge was "an unreasonable obstruction to navigation." The Order to Alter was issued pursuant to the Truman-Hobbs Act, 33 U.S.C. §§ 511-524, which authorizes the United States Coast Guard to investigate whether a bridge is unreasonably obstructing navigation and to order a bridge owner to alter a bridge which does indeed unreasonably obstruct navigation.

The parties entered into a settlement agreement; however, the agreement was predicated on the district court deciding one specific legal issue: "Does the Truman-Hobbs

Act finding that the bridge is 'an unreasonable obstruction to navigation' render inapplicable any presumption that negligence of the barge crew was the cause of an allision between a moving vessel and a stationary bridge." *Union Pac. R.R. Co. v. Kirby Inland Marine et al.*, No. 3-99-CV-80185, slip op. at 1, 2001 WL 1689710 (S.D.Iowa Aug. 13, 2001) The presumption in question is the longstanding *Oregon* rule which raises a presumption that a vessel's crew was negligent when a vessel strikes a stationary object such as a bridge. *The Oregon*, 158 U.S. 186, 197, 15 S.Ct. 804, 39 L.Ed. 943 (1895). Under the parties' settlement agreement, if the district court concluded that the *Oregon* rule does apply, then Kirby would pay an agreed amount; alternatively, if the district court concluded that the *Oregon* rule does not apply, then Kirby would pay a *674 smaller agreed amount. Thus, the primary issue before the district court was whether the Coast Guard's Order to Alter trumps the *Oregon* rule.

B. District Court's decision

Although the district court initially stated that the *Oregon* rule should apply, the district court eliminated the presumption by invoking the *Pennsylvania* rule which is another longstanding admiralty principle. Under the *Pennsylvania* rule, "[w]here any party violates a statutory or regulatory rule designed to prevent collisions, that party has committed per se negligence . . . and [that party] has the burden of proving that its statutory fault was not a contributing cause of the accident." *Union Pac. R.R. Co. v. Kirby Inland Marine et. al*, No. 3-99-CV-80185, slip op. at 3, 2001 WL 1689710 (S.D.Iowa Aug. 13, 2001) (citing *The Pennsylvania*, 19 Wall. 125, 86 U.S. 125, 136, 22 L.Ed. 148 (1873)). The district court concluded that Appellant violated 33 U.S.C. § 512 of the Truman-Hobbs Act which states that "No bridge shall at any time unreasonably obstruct the free

navigation of any navigable waters of the United States." 33 U.S.C. § 512. The district court found that a violation of § 512 is sufficient to invoke the *Pennsylvania* rule and thus "the normal presumption of fault that attaches to the vessel under the *Oregon* rule is shifted back to the structure owner under the *Pennsylvania* rule." *Union Pac.*, at *3.

The district court also concluded that the Coast Guard's Order to Alter was admissible pursuant to Federal Rules of Evidence 402 and 803(8)(C). *Id.* at 4. Appellant filed a timely notice of appeal and now asserts that the district court erred by concluding that: (1) the *Oregon* rule does not apply to the instant case, and (2) the Order to Alter is admissible.

II. Discussion

A. The *Oregon* Rule

We will first consider whether the district court erred by invoking the *Pennsylvania* rule to trump the *Oregon* rule and shift the burden of persuasion back to Appellant. We review the district court's conclusions of law de novo. *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir.2002) (citing *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir.2001)).

[1][2] For the *Pennsylvania* rule to apply, three elements must exist: (1) proof by a preponderance of the evidence of violation of a statute or regulation that imposes a *mandatory duty;* (2) the statute or regulation must involve *marine safety* or navigation; and (3) the injury suffered must be of a nature that the statute or regulation was intended to prevent. *Folkstone Mar. Ltd. v. CSX Corp.*, 64 F.3d 1037, 1047 (7th Cir.1995) (emphasis added). The Truman-Hobbs Act does not satisfy the prerequisites of the *Pennsylvania* rule because it was not drafted: (1) to maintain marine safety; (2) to impose a specific duty; or (3) to prevent a specific sort of injury.

We find that the Truman-Hobbs Act is a funding statute and not a safety statute. Congress stated that it drafted the Truman-Hobbs Act "to provide an orderly method for the just apportionment of the cost of the reconstruction or alteration of bridges over navigable waters where navigation conditions require such reconstruction or alteration of bridges heretofore built in accordance with law. . . ." House Report No. 1447, August 2, 1939, 76th Cong. 1st Sess.

The regulations implementing the Truman-Hobbs Act establish a lengthy administrative procedure for determining whether a bridge is "an unreasonable obstruction *675 to navigation." *See* 33 C.F.R. § 116.01-116.55 (setting out complaint process, preliminary investigation, detailed investigation, public hearing, and administrative review). Ultimately, the Chief Officer of the Bridge Administration (the "Chief") performs a cost/benefit analysis to determine whether the benefits to navigation exceed the government's cost of altering the bridge. 33 C.F.R. § 116.30. If the benefits exceed the costs, then the Chief recommends that the Coast Guard issue an Order to Alter stating that the bridge unreasonably obstructs navigation. *Id.* Once the Coast Guard concludes that a bridge is an unreasonable obstruction to navigation, the bridge owner must: (1) submit plans and specifications for altering the bridge; (2) solicit and submit bids; and (3) request an Apportionment of Costs which outlines which costs will be borne by bridge owner and the United States government. *See* 33 U.S.C. §§ 514-516; 33 C.F.R. §§ 116.40, 116.45, 116.50.

Looking at the Truman-Hobbs Act as a whole, a § 512 finding that a bridge is an "unreasonable obstruction to navigation" is not a direct comment on the safety of the bridge. Instead, the Coast Guard labels a bridge an unreasonable obstruction in order to facilitate the funding process. Accordingly, we conclude that the Truman-Hobbs Act does not satisfy the first element of the *Pennsylvania* rule

because it was not drafted to protect marine safety, but to establish a procedure to provide government funds to assist bridge owners in altering their bridges.

The Truman-Hobbs Act also does not satisfy the other two prerequisites of the *Pennsylvania* rule as it does not impose a specific duty or prevent a specific sort of injury. Once the Coast Guard concludes that a bridge violates § 512, the bridge owner is required only to prepare a plan for altering the bridge. This "duty" is very different from a duty to maintain lights and signals on a bridge or to promptly open a draw. *See* 33 U.S.C. § 494 (requiring a bridge owner to maintain "such lights and other signals thereon as the Commandant of the Coast Guard shall prescribe" and to promptly open such draw upon reasonable signal for the passage of boats and other water craft). With respect to the latter duties, the application of the *Pennsylvania* rule is justified because a bridge owner greatly increases the risk of allision by failing to promptly open a draw or by neglecting to maintain the bridge's lights. Conversely, a bridge owner's failure to prepare a plan for altering a bridge will delay the funding process, but will not directly increase the risk of allision.

Also, the goal of the Truman-Hobbs Act was to decrease the cost of navigation by using government funds to alter bridges which unreasonably obstruct such navigation. Although the bridge alterations may reduce the amount of allisions, this is a collateral consequence and not a direct purpose of the Truman-Hobbs Act. To state it another way, the Truman-Hobbs Act was not designed to prevent any specific type of injury. Thus, any injury suffered in admiralty is not "of a nature that the [Truman-Hobbs Act] was intended to prevent." *Folkstone Mar. Ltd. v. CSX Corp.*, 64 F.3d 1037, 1047 (7th Cir.1995).

[3] In concluding that the district court incorrectly invoked the *Pennsylvania* rule, we further note that the

district court did not cite a single case in which a court applied the *Pennsylvania* rule solely because a bridge violated the Truman-Hobbs Act. In *Nassau County Bridge Authority v. Tug Dorothy McAllister,* 207 F.Supp. 167, 172 (E.D.N.Y.1962), the district court applied the *Pennsylvania* rule because the bridge tender violated 33 U.S.C. §§ 494 by failing to promptly open a draw for an *676 approaching ship. In *Folkstone Maritime, Limited v. CSX Corp.,* 64 F.3d 1037 (7th Cir.1995), the court applied the *Pennsylvania* rule because the bridge owner violated 33 U.S.C. § 491 which provides that "it is unlawful for a bridge to deviate from its plans and specifications for its construction . . . unless the modification of the bridge is previously submitted to and approved by the Secretary of Transportation." The *Folkstone* court concluded that the bridge owner violated § 491 by failing to abide by the Coast Guard's order to construct a draw which could be raised to 83 degrees. *Folkstone,* 64 F.3d at 1048-49. Unlike the present case, *Nassau* and *Folkstone* involve active negligence on the part of bridge owners.

Although these cases cited § 512, neither court explained how a violation of that particular statute served to invoke *Pennsylvania* rule.[2] Accordingly, we find that the district court did not present any authority to support its conclusion that a violation of the Truman-Hobbs Act invokes the *Pennsylvania* rule.

We will not invoke the *Pennsylvania* rule to punish a bridge owner who controls a lawful bridge. Under the Truman-Hobbs Act, a bridge labeled an unreasonable obstruction is still a *lawful* bridge. 33 U.S.C. § 511. In order

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[2] The district court also cited *City of Boston v. S.S. Texaco Texas,* 773 F.2d 1396 (1st Cir.1985) to support its application of the *Pennsylvania* rule; however, the *City of Boston* case does not discuss the *Pennsylvania* rule so we will not discuss it here.

to obtain funding under the Truman-Hobbs Act, the bridge must be "lawful" and used as a railroad or a public highway. *Id.* To maintain a lawful bridge, bridge owners must abide by the laws and regulations governing bridges. The Clinton Bridge was built in 1907 in accordance with then-current Department of Transportation procedures and it currently complies with the Coast Guard's regulations. Appellees do not assert that Appellant caused this allision through active negligence; instead, they fault the bridge owner for failing to alter the Clinton Bridge to accommodate the ever-increasing size of commercial barges and tows. We will not employ the *Pennsylvania* rule to punish a bridge owner who maintains a lawful bridge, even though the Coast Guard has found such a bridge to be an unreasonable obstruction due to the barge industry's expansion of the size of its commercial vessels.

In sum, we find that the district court should not have relied on a violation of the Truman-Hobbs Act to invoke the *Pennsylvania* rule. Accordingly, the district court erred by concluding that a violation of § 512 invokes the *Pennsylvania* rule and shifts the burden of persuasion back to Appellant. Instead, the district court should have applied the *Oregon* presumption.

[4] We now address Appellees' assertion that we should affirm the district court's judgment because the Coast Guard's declaration that the bridge is an unreasonable obstruction to navigation rebuts the *Oregon* presumption and shifts the burden of proof back to the bridge owner. In order to affirm the district court's judgment, we would have to conclude, as a matter of law, that the Coast Guard's Order to Alter rebuts the *Oregon* presumption. Because we believe the trier of fact should determine whether the *Oregon* presumption is rebutted by the Coast Guard's Order to Alter, we cannot affirm the district court's legal conclusion that the *Oregon* rule does not apply.

Appellees rely on *I & M Rail Link, LLC v. Northstar Navigation, Inc.*, 198 F.3d 1012 (7th Cir.2000) to support their position that the Coast Guard's Order to Alter *677 rebuts the *Oregon* presumption and shifts the burden of proof back to the bridge owner. The Seventh Circuit case is strikingly similar to the case at bar as it arose from an allision between a large seagoing vessel and the Sabula Bridge, a century-old railroad bridge. *Id.* at 1013. Ten months prior to the allision, the Coast Guard had issued an Order to Alter finding that the Sabula Bridge was "an unreasonable obstruction to navigation." *Id.* at 1014. The district court applied the *Oregon* presumption and granted summary judgment against the defendant vessel. *Id.* Although the defendant "sought to rebut the *Oregon* presumption by arguing that the Sabula Bridge is an unreasonable obstruction to navigation," the district court decided to ignore the Coast Guard's Order to Alter because it was part of the Truman-Hobbs Act and therefore had no significance in a negligence action. *Id.* The Seventh Circuit disagreed.

Writing for the panel, Judge Easterbrook reversed the district court's grant of summary judgment and remanded the case for trial because the defendant presented sufficient evidence to raise a question of fact on the issue of negligence. Judge Easterbrook noted that the Coast Guard's Order to Alter was not an "unelaborated ukase," but a conclusion based on evidence that: (1) the Sabula Bridge repeatedly is struck; and (2) the bridge's outdated structure does not allow modern-day vessels to navigate easily through the bridge. *Id.* at 1015-16. Ultimately, Judge Easterbrook concluded that:

> If the Coast Guard may find the Sabula Bridge an unreasonable obstruction based on the cost and accident data, then so may the *trier of fact* in admiralty. . . . Findings in the Coast Guard's report are more than adequate to overcome *The Oregon's* presumption. . . .

> The trier of fact must give an answer without resort to presumptions. *Although the Coast Guard's findings may well be conclusive for some purposes . . . the question remains whether the shortcomings of the bridge caused this accident.*

Id. at 1016 (emphasis added) (citations omitted).

Appellees maintain that the *I & M Rail Link* case stands for the proposition that, as a matter of law, the Coast Guard's Order to Alter rebuts the *Oregon* presumption and thus the litigation should proceed on a level playing field. This view seems to be based on the single sentence "The trier of fact must give an answer without resort to presumptions." We, however, interpret the Seventh Circuit's opinion differently.

In our view, the *I & M Rail Link* case stands for the proposition that a defendant can attempt to *rebut* the *Oregon* presumption by presenting evidence that the Coast Guard labeled the bridge an "unreasonable obstruction to navigation." Under *I & M Rail Link,* a Coast Guard Order to Alter is not conclusive evidence of negligence, but merely another piece of evidence which the *trier of fact* may consider in determining fault in a negligence action. *See I & M Rail Link,* 198 F.3d at 1016 ("Although the Coast Guard's findings may well be conclusive for some purposes . . . the question remains whether the shortcomings of the bridge cause this accident."). Our interpretation is shared by the lower court which, on remand, tried the case in accordance with the Seventh Circuit's opinion. *See I & M Rail Link v. Northstar Navigation,* No. 98-C-50359, 2001 WL 460028, at *4 (N.D.Ill. April 27, 2001) ("It is true the Seventh Circuit referred to the previous accidents at the Sabula Bridge included in the Coast Guard's reports, and said the trier of fact may find the Sabula Bridge an unreasonable obstruction based on the *678 Coast Guard's cost and accident data. . . . *But it did so in the context of explaining its*

holding on a rather narrow issue: that this evidence could be used to rebut the presumption of The Oregon. . . .") (emphasis added). To the extent that the *I & M Rail Link* case can be interpreted to hold that a Coast Guard's Order to Alter rebuts and overcomes the *Oregon* presumption, as a matter of law, we respectfully disagree.

Our interpretation of *I & M Rail Link* is in accordance with longstanding precedent which allows a moving vessel to rebut the *Oregon* presumption by presenting evidence that the bridge was an unreasonable obstruction to navigation. *Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co.*, 259 F. 166, 168 (4th Cir.1919). In *Wilmington Ry. Bridge Co.*, the Fourth Circuit stated that the *Oregon* presumption may be rebutted:

> by proof that the location of the stationary vessel, *the obstruction of navigation by the bridge,* or other causes had brought the moving vessel into an emergency not to be reasonably foreseen, and that the course taken by the navigator in the emergency was such as might well have been taken by a prudent and skillful navigator.

Id. (emphasis added).

In its own words, the district court stated that "[t]he single *legal* question they ask this court to answer is: Does the Truman-Hobbs Act finding that the bridge is "an unreasonable obstruction to navigation" render inapplicable any presumption that negligence of the barge crew was the cause of a collision between a moving vessel and a stationary bridge?" *Union Pac.*, No. 3-99-CV- 80185 at 1. To state it another way, the district court was considering whether, as a matter of law, a Truman-Hobbs Act finding trumps the *Oregon* presumption. We conclude that a Truman-Hobbs Act finding does not render inapplicable the *Oregon* rule and therefore reverse the district court's conclusion to the contrary in this case.

In remanding we recognize that Appellees have produced evidence regarding the "obstructive character" of the Clinton Bridge. Appellees note that the Coast Guard's Detailed Report: (1) documents more than 300 allisions between the Clinton Bridge and various vessels in a ten year period; (2) emphasizes the fact that the Clinton Bridge is out of date and does not permit the smooth navigation of modern-day commercial vessels; and (3) criticizes the poor position of the Clinton Bridge.[3] The parties, however, did not ask the district court to consider whether Appellees presented sufficient evidence to rebut the *Oregon* presumption; thus, that question is not currently before this Court. Instead, the parties posed the single legal question of whether a Truman-Hobbs Act finding that a bridge is an unreasonable obstruction to navigation renders inapplicable the *Oregon* presumption. We conclude that the answer to that particular question is "no."

Accordingly, we find that the district court erred by concluding as a matter of law that the *Oregon* presumption does not apply. *See Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co.*, 259 F. 166, 168 (4th Cir.1919). The opinion of the district court is reversed.

B. Federal Rule of Evidence 803(8)(C)

Appellant also asserts that the district court erred by admitting the Coast *679 Guard's Order to Alter into evidence.[4] We review the district court's evidentiary rulings

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[3] We note that the Coast Guard's detailed report was not included in the parties' Stipulated Facts.

[4] Although Appellant seems to oppose the district court's admission of other documents, we find that the district court's opinion relates only to the February 28, 1996 Order to Alter. *See Union*

(continued...)

"under the abuse of discretion standard, according the district court substantial deference." *Gagnon v. Sprint Corp.*, 284 F.3d 839, 856 (8th Cir.2002) (citing *Shelton v. Consumer Prods. Safety Comm'n*, 277 F.3d 998, 1009 (8th Cir. 2002)). In its opinion, the district court specifically stated that the "[t]he Coast Guard findings are admissible under Federal Rules of Evidence 402 and 803(8)(C)." *Union Pac. R.R. Co. v. Kirby Inland Marine et. al*, No. 3-99-CV-80185, slip op. at 4, 2001 WL 1689710 (S.D.Iowa Aug. 13, 2001). The court further concluded that the findings are "trustworthy" because "they are based on factual investigation, and they are directly relevant to the issues here." *Id.*

Rule 803(8)(C) of the Federal Rules of Evidence defines the "public records and reports" which are not excludable under the hearsay rule. Rule 803(8)(C) specifically excludes "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170, 109 S.Ct. 439, 450, 102 L.Ed.2d 445 (1988), the Supreme Court specifically concluded that opinions, conclusions, and findings of fact are admissible under Rule 803(8)(C). The Court further stated that "[a]s long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report." *Id.*

[5] The party opposing the admission of the report has the burden of proving the report's untrustworthiness. *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1304 (5th Cir.1991). When considering whether a report is trustworthy, the court should not consider whether the report is

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[4] (...continued)
Pac. R.R. Co. v. Kirby Inland Marine et al., No. 3-99-CV-80185, judgment (S.D.Iowa Aug. 13, 2001).

credible, but rather should consider whether the report is reliable. *Id.* at 1306-07. "The Rule 803 trustworthiness requirement, therefore, means that the trial court is to determine primarily whether the report was compiled or prepared in a way that indicates that its conclusions can be relied upon." *Id.* at 1307.

[6] We find that the district court did not abuse its discretion by concluding that the Coast Guard's Order to Alter is admissible pursuant to Rule 803(8)(C). The Coast Guard's investigation into the Clinton Bridge was mandated by law. *See* 33 C.F.R. § 116.10 ("Upon receipt of a written complaint, the District Commander will review the complaint to determine if . . . the complaint is justified and whether a Preliminary Investigation is warranted."). As was discussed above, the Truman-Hobbs Act established a thorough review process to determine whether a bridge should be altered because it is an unreasonable obstruction to navigation. This process includes a preliminary investigation, detailed investigation, public hearing, and an administrative review. *See* 33 C.F.R. § § 116.01-116.55. The fact that Coast Guard investigators relied on hearsay evidence to reach their conclusions does not mean that the preparation of the report was untrustworthy. *Moss,* 933 F.2d at 1309.

In sum, Appellant has not presented any evidence that the Coast Guard's Order to *680 Alter contained findings and conclusions which were untrustworthy. Accordingly, we conclude that the district court did not abuse its discretion by admitting the document, and we therefore affirm the district court's conclusion to admit the Order to Alter into evidence.

III. Conclusion

For the foregoing reasons, the district court's conclusions of law and final judgment are reversed in part and affirmed in part.

APPENDIX B

Not Reported in F.Supp.2d
2001 A.M.C. 2857
(Cite as: 2001 WL 1689710 (S.D.Iowa))

United States District Court, S.D. Iowa,
Davenport Division.

UNION PACIFIC RAILROAD CO., Plaintiff,

v.

KIRBY INLAND MARINE, INC. OF MISSISSIPPI
a/k/a Brent Transportation Company, in
personam and the M/V Miss Dixie,
its engines, tackle, fixtures and
appurtenances, etc., in rem, Defendant.

No. 3-99-CV-80185.

Aug. 13, 2001.

CONCLUSIONS OF LAW BASED ON A STIPULATED RECORD

WOLLE, J.

*1 Plaintiff Union Pacific Railroad Co. (Union Pacific) owns the Clinton Bridge. Union Pacific filed this admiralty and maritime suit, claiming money damages from defendant Kirby Inland Marine, Inc. (Kirby) on the ground that its vessel and/or tow struck the bridge, causing damage.

The parties stipulated to facts and on July 17, 2001, presented argument by telephone conference call. The single legal question they ask this court to answer is: Does the Truman-Hobbs Act finding that the bridge is "an unreasonable obstruction to navigation" render inapplicable any presumption that negligence of the barge crew was the cause of a collision between a moving vessel and a stationary bridge?

The court concludes the presumption does not apply. A Coast Guard Truman-Hobbs Order to Alter issued prior to the collision found the bridge to be an unreasonable obstruction to navigation, thereby eliminating any presumption of crew negligence that may otherwise have existed.

Findings of fact. The court adopts and incorporates herein the parties' stipulated facts filed May 15, 2001.

Conclusions of law.

1. "As in other civil cases, the plaintiff has the burden of proving by a preponderance of the evidence that the defendant vessel was negligent and that this negligence was a proximate cause of the injury." *Illinois Constructors Corp. v. Logan Transp. Inc.*, 715 F.Supp. 872, 879 (N.D.Ill.1989). Plaintiff can satisfy this initial burden and establish a prima facie case of negligence by invoking the *Oregon* rule. *Id.*

2. The *Oregon* rule states that a moving vessel is presumptively at fault in a collision where the moving vessel hits a stationary object. *The Oregon,* 158 U.S. 186 (1895). The Supreme Court stated that hitting a stationary object raised a presumption of fault on the part of the moving vessel, and "the burden of proof is upon [the moving vessel] to exonerate herself from liability." *Id.* at 192-193. Under *The Oregon* presumption, the burden of proof shifts from the plaintiff to the defendant vessel.

3. Here, defendant's moving vessel struck the stationary Clinton Bridge. Union Pacific can therefore invoke the *Oregon* presumption and shift the burden of proof to Kirby. Kirby can overcome this presumption of fault only by proving that it actually was without fault, the stationary object was at fault, or that the collision was inevitable. *Bunge Corp. v. M/V Furness Bridge,* 558 F.2d 790, 795 (5th Cir.1977) (citing *Carr v. Hermosa Amusement Corp.,* 137 F.2d 983, 985 (9th Cir.1943)).

4. On February 28, 1996, prior to the collision, the Commandant of the U.S. Coast Guard issued an Order to Alter that states the Clinton Bridge "is an unreasonable obstruction to navigation." This is in direct violation of 33 U.S.C. § 512, which states:

> No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States.

5. Where any party violates a statutory or regulatory rule designed to prevent collisions, that party has committed per se negligence, and under the *Pennsylvania* rule, has the burden of proving that its statutory fault was not a contributing cause of the accident. *The Pennsylvania,* 86 U.S. 125, 136 (1873).

*2 6. Courts have held that the *Pennsylvania* rule applies to bridges. *Folkstone Maritime, Ltd. v. CSX Corp.,* 64 F.3d 1037 (7th Cir.1995); *City of Boston v. S.S. Texaco Tex.,* 773 F.2d 1396, 1397-98 (1st Cir.1985); *Nassau County Bridge Authority v. Tug Dorothy McAllister,* 207 F.Supp. 167, 171 (D.C.N.Y.1962).

7. Here, the normal presumption of fault that attaches to the vessel under the *Oregon* rule is shifted back to the structure owner under the *Pennsylvania* rule. *See Illinois Constructors,* 715 F.Supp. at 879 (citing *United States v. Norfolk-Berkley Bridge Corp.,* 29 F.2d 115, 125 (E.D.Va. 1928)).

8. The bridge owner must prove that its failure to comply with the statutory or regulatory requirements could not have been a factor that contributed to the injury. *See Complaint of Wasson,* 495 F.2d 571, 579-80 (7th Cir.1974).

9. The Coast Guard findings are admissible under Federal Rules of Evidence 402 and 803(8)(C). They are trustworthy, they are based on factual investigation, and they are directly relevant to the issues here.

10. The Supreme Court concluded in *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153 (1988), that Rule 803(8)(C) did not preclude as inadmissible investigative JAG reports on a U.S. Navy plane crash, so long as they met two criteria. All statements in such a report must be based on factual investigation, and any portion of the report admitted must be sufficiently trustworthy. *Id.* at 167. In determining whether a report is sufficiently trustworthy, the Supreme Court cited with approval the use of four non-exhaustive factors:

> (1) the timeliness of the investigation; (2) the investigator's skill and experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation.

Id. at 168 n. 11. The party opposing the introduction of such reports bears the burden of coming forward with enough "negative factors" to persuade a court that a report should not be admitted. *See Complaint of Nautilus Motor Tanker Co., Ltd.,* 85 F.3d 105, 113 (3rd Cir.1996) (citing *Beech* at 167). Union Pacific has failed to persuade this court that the Coast Guard's findings should not be admitted.

Summary. The *Oregon* presumption does not apply under the facts of this case. Admissible is the Coast Guard order issued February 28, 1996. It eliminates any presumption of crew negligence that may otherwise have existed.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 01-3334	)	
	)	
Union Pacific Railroad,	)	
	)	
Appellant,	)	Order Denying Petition
v.	)	for Rehearing and for
	)	Rehearing En Banc
	)	
Kirby Inland Marine Inc.	)	
of Mississippi, etc., et al.,	)	
	)	
Appellees.	)	

The appellee's petition for rehearing en banc is denied. The appellant's petition for rehearing by the panel is also denied.

(5128-010199)

August 15, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

(2)

Supreme Court, U.S.
FILED
DEC 30 2002
OFFICE OF THE CLERK

No. 02-739

In The
Supreme Court of the United States

KIRBY INLAND MARINE, INC. OF MISSISSIPPI, a/k/a BRENT TRANSPORTATION COMPANY, *in personam* and the M/V MISS DIXIE, its engines, tackle, fixtures and appurtenances, etc., *in rem*,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

UNION PACIFIC'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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3 HPP

QUESTION PRESENTED FOR REVIEW

Does A Truman-Hobbs Act (33 U.S.C. §§ 511-524) Order To Alter Which States "The Clinton Railroad Drawbridge Is An Unreasonable Obstruction To The Free Navigation Of The Upper Mississippi River" Change Admiralty Law To Make The *Oregon* Presumption Of Ship's Crew Negligence Inapplicable When A Vessel Strikes A Truman-Hobbs Act Bridge?

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STATUTES AND REGULATIONS INVOLVED

A. The following statutes and regulations are set out verbatim in the Union Pacific Cross-Petition Appendix:

Sections 401, 406 and 502 of *Subchapter I* of Chapter 11 of Title 33, U.S.C., from the Rivers and Harbors Act of 1899.

Section 494 of *Subchapter I* of Chapter 11 of Title 33, U.S.C., from the Bridge Act of 1906.

Sections 511, 512, 513, 516, 518, 519 and 522 of *Subchapter II* of Chapter 11 of Title 33, U.S.C., from the Truman-Hobbs Act of 1941.

Sections 114.10, 114.30, 114.40 and 116.01(e) of 33 C.F.R.

B. The following statutes and regulations are set out verbatim in the Appendix to this brief:

Sections 491 and 495 of *Subchapter I* of Chapter 11 of Title 33, U.S.C., from the Bridge Act of 1906.

Section 116.30 of 33 C.F.R.

STATEMENT OF THE CASE

This case was submitted to the District Court on stipulated facts. On May 5, 1996, Kirby's vessel, the M/V MISS DIXIE and/or its tow of barges struck Union Pacific's Clinton Railroad Bridge. Union Pacific brought this action alleging damage to its bridge was caused by negligence of the crew of the M/V MISS DIXIE and/or by the unseaworthiness of that vessel. Kirby denied its crew was negligent or its vessel was unseawothy, alleged that Union

Pacific itself was negligent in the construction, design, care and maintenance of the Clinton Railroad Bridge, and further alleged the defense of set-off for damage sustained by the M/V MISS DIXIE and/or its tow.

The Clinton Railroad Bridge was authorized by, and constructed and maintained in accordance with, permits issued by the United States Coast Guard (and formerly by the United States Secretary of the Army) pursuant to the Rivers and Harbors Act, 33 U.S.C. § 401. On the date of the allision (admiralty law term for a collision) the bridge was operated under these permits.

A separate federal act, the Truman-Hobbs Act, authorizes the United States Coast Guard to order bridge owners to alter bridges when they "unreasonably obstruct the free navigation of any navigable waters of the United States." 33 U.S.C. §§ 511-524. On February 28, 1996, the United States Coast Guard had issued a Truman-Hobbs Order to Alter, finding that the Clinton Railroad Drawbridge "is an unreasonable obstruction to navigation . . . ".

The *Oregon* rule is a long-standing principle of judge-made admiralty law that raises a presumption that a vessel's crew is negligent when a vessel strikes a stationary object such as a bridge. *The Oregon*, 158 U.S. 186, 197 (1895). The District Court held the issuance of a Truman-Hobbs Act Order to Alter " . . . eliminates any presumption of crew negligence that may otherwise have existed." In reaching this result, the District Court also held, "The Coast Guard findings are admissible under Federal Rules of Evidence 402 and 803(8)(C)."

The Eighth Circuit Panel reversed the District Court's holding that the *Oregon* presumption of ship's crew negligence did not apply to an allision with a bridge for which

the Coast Guard had issued a Truman-Hobbs Order to Alter. *Union Pacific Railroad Company v. Kirby Inland Marine, Inc., of Mississippi*, 296 F.3d 671, 674-675 (8th Cir. 2002). However, the Panel went on to also hold that the Coast Guard Order to Alter, stating that the Clinton Railroad Bridge was "an unreasonable obstruction to navigation . . . ", was admissible evidence in a negligence action for damages. *Id.*, at 679-680. Union Pacific has filed a cross-petition for writ of certiorari challenging that evidentiary ruling by the Panel.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW BY THE EIGHTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IN *I & M RAIL LINK, LLC V. NORTHSTAR NAVIGATION, INC.*

The Eighth Circuit Court of Appeals opinion below discusses at length the Seventh Circuit's decision in *I & M Rail Link LLC v. Northstar Navigation, Inc.*, 198 F.3d 1012 (2000), *rehearing denied*, 205 F.3d 333 (7th Cir. 2000), *cert. denied*, 531 U.S. 917, 121 S.Ct. 276 (2000), *on remand*, 2001 WL 460028 (N.D. Ill. 2001). *Union Pacific Railroad Company v. Kirby Inland Marine, Inc. of Mississippi*, 296 F.3d 671, 676-678 (8th Cir. 2002). The eighth Circuit Panel's opinion points out that in *I & M Rail* the district court entered judgment for the railroad on a motion for summary judgment. *Union Pacific*, 296 F.3d at 677; *see*, *I & M Rail*, 198 F.3d at 1013, *rehearing denied*, 205 F.3d at 334. The Eighth Circuit Panel said its opinion did not conflict with the Seventh Circuit's *I & M Rail*

decision because the Seventh Circuit there held only that "a Coast Guard Order to Alter is not conclusive evidence of negligence, but merely another piece of evidence which the *trier of fact* may consider in determining fault in a negligence action." 296 F.3d at 677.

The Seventh Circuit held in *I & M Rail* that the Coast Guard report including the order to alter was admissible and that the report was sufficient in that case to create a fact question. 198 F.3d at 1015, *rehearing denied*, 205 F.3d at 334-335. For summary judgement purposes the facts had to be interpreted in favor of defendant Northstar. The Seventh Circuit simply held that the trier of fact could find for Northstar. It did not hold the Coast Guard report was conclusive. The Seventh Circuit did not hold that at trial the vessel would not have the burden of proof as the *Oregon* rule dictates. The Seventh Circuit explained in *I & M Rail* at 205 F.3d 34-35:

> Seaboard likewise was decided after a trial. The Secretary of War had ordered the bridge's span to be increased so that the Port of Savannah could accommodate larger oceangoing vessels. This did not imply that the bridge posed safety hazards to the smaller vessels that had long been using the port. Moreover, the court of appeals did not conclude that a renovation order should be ignored; it held, instead, that such an order is not conclusive on the trier of fact, not only because it is issued ex parte but also because it does not establish that a particular shortcoming caused a given allision. We reached the same conclusion: the facts underlying the Coast Guard's decisions concerning the Sabula Bridge imply that shortcomings in its design may have played a causal role in the allision, but whether this is so (indeed, whether the design is deficient) is for the trier of fact.

On remand, the District Court for the Northern District of Illinois, at 2001 WL 460028, p. 4, explained:

> The court also does not read the Seventh Circuit's opinion as a short cut around this analysis. It is true that the Seventh Circuit referred to the previous accidents at the Sabula Bridge included in the Coast Guard's reports, and said the trier of fact may find the Sabula Bridge an unreasonable obstruction based on the Coast Guard's cost and accident data. See id. at 1015-16. But it did so in the context of explaining its holding on a rather narrow issue: that this evidence could be used to rebut the presumption of The Oregon, 158 U.S. 186 (1895). The court simply did not address whether these other accidents were "substantially similar" to the May 1997 allision so as to be admissible at trial. And it is unlikely the court intended its holding either to completely do away with, or act as a substitute for, a finding of "substantial similarity."

The issue before the Eighth Circuit Panel was whether enactment of the Truman-Hobbs Act was intended by Congress to change the judge-made *Oregon* rule that a vessel's crew is presumed negligent when the vessel strikes a bridge. The Act clearly did not make such a change in existing judge-made law and neither the Seventh Circuit nor the Eighth Circuit so held.

II. THE TRUMAN-HOBBS ACT DOES NOT EVIDENCE ANY CONGRESSIONAL INTENT TO WORK A CHANGE IN THE JUDGE-MADE ADMIRALTY NEGLIGENCE LAW RULE THAT A SHIP'S CREW IS PRESUMED NEGLIGENT WHEN A SHIP STRIKES A STATIONARY STRUCTURE.

A. A Proposed Construction Of A Statute Which Is In Derogation Of Judge-Made Law Will Be Strictly Scrutinized, And Whenever Possible A Construction Of The Statute That Changes Longstanding Judge-Made Law Will Be Rejected.

"Where, indeed, the expressions in an act of Assembly are in general terms, they are to receive a construction that may be agreeable to the rules of common law in cases of a similar nature." *Leving v. Will*, 1 U.S. 430, 434 (1789). A statute " . . . in derogation of the common law . . . is to be taken strictly." *Brown v. Barry*, 3 U.S. 365, 367 (1797). The rule was also endorsed in *Shaw v. Railroad Company*, 101 U.S. 557, 565 (1879):

> "No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."

This rule is alive and healthy today. In *United States v. Texas*, 507 U.S. 529, 534 (1993), the Court instructed:

> Just as longstanding is the principle that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the

> contrary is evident." [Citation omitted] In such cases, Congress does not write upon a clean slate. Astoria, supra, at 108, 111 S.Ct., at 2169-2170. In order to abrogate a common-law principle, the statute must "speak directly" to the question addressed by the common law. [Citation omitted]

Accord: Robert C. Herd & Company v. Krawill Machinery Corporation, 359 U.S. 297, 363-65 (1959); *Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Telephone Company of Virginia*, 464 U.S. 30, 35-36 (1983).

B. The Truman-Hobbs Act Does Not Evidence Any Congressional Intent To Financially Penalize Through Negligence Damage Actions A Railroad Or Government Highway Authority For Failure To Reconstruct With Its Own Funds A Bridge That Is The Subject Of A Truman-Hobbs Order To Alter.

Union Pacific's Clinton Railroad Bridge operates under permits issued by the United States Coast Guard (and formerly by the United States Secretary of the Army) under 33 U.S.C. § 401 (Rivers and Harbors Act) and 33 U.S.C. § 491 (Bridge Act of 1906). Those sections provide that it is unlawful to construct a bridge over a navigable river without Congress' statutory consent and approval of the plans by the Secretary of Transportation. Section 406 of Title 33 provides that every person or corporation violating Section 401, 403 or 404 of Title 33 can be punished by fine and/or imprisonment, and that removal of the offending structure can be enforced by federal court injunction.

3 C.F.R. § 114.10 provides:

> The decision as to whether a bridge permit or a draw bridge operation regulation will be issued or promulgated [under 33 U.S.C. § 401] must rest primarily upon the effect of the proposed action on navigation to assure that the action provides for the reasonable needs of navigation. . . .

33 C.F.R. § 114.30 provides:

> Permits may be revoked by the issuing official for failure on the part of the permittee to comply with any of the conditions therein, or where the structures or other work constitute an unreasonable obstruction to navigation. . . .

33 C.F.R. § 114.40 provides:

> The Coast Guard has the authority and responsibility for enforcement of the applicable provisions of law for the protection and preservation of navigable waters. It is the policy of the Coast Guard to secure compliance with these provisions of law short of legal proceedings. As a general principle, no action is taken when the violation is minor, unintentional, or accidental and the party responsible corrects the violation. It is the policy of the Coast Guard to implement civil or criminal proceedings in all other circumstances. . . .

The clear intent of 33 U.S.C. §§ 401, 406 and 491, and the implementing agency regulations, is to grant to the owner of a bridge who complies with the statutes and regulations the right to operate the bridge as presently constructed. The Coast Guard has the power to levy fines, institute civil and criminal proceedings, and obtain a court injunction to remove all or part of a bridge structure, if a bridge owner does not comply with these statutes and

regulations. The Union Pacific's Clinton Railroad Bridge has not been the subject, either before or after the issuance of the Truman-Hobbs Order to Alter, of any fines, civil or criminal proceedings, or Coast Guard or court orders to remove any part of the bridge structure (other than the Truman-Hobbs Order itself). There were no plans approved for any reconstruction nor any completion date set.

The Truman-Hobbs Act has a purpose entirely different from determining whether the *design and construction* of a bridge at any particular point in time is lawful. The purpose of the Truman-Hobbs Act is to make available a process whereby the *alteration* of a bridge to make it more beneficial to the navigation industry *can be accomplished by use of federal funds* which subsidize the barge industry. 33 U.S.C. § 516; House Report No. 1447, August 2, 1939, 76th Cong., 1st Sess. (accompanying 54 Stat. Chap. 409, §§ 1-3, June 21, 1940).

In the case of a Truman-Hobbs bridge (one owned by a railroad or public highway authority), the Order to Alter does not set out any time-frame within which the alteration must be accomplished. This is because completing an alteration depends upon various actions to be taken by the government, not the least of which is a special appropriation by Congress for the alteration to the specific bridge that is the subject of the Order to Alter. 33 U.S.C. § 518. Rivers and Harbors Act *orders to alter for non-Truman-Hobbs bridges do set a time for completion.* 33 U.S.C. § 494. Section 116.01(e) of 33 C.F.R. provides:

> (e) If the Coast Guard determines that alterations to a bridge are necessary, the Commandant, U.S. Coast Guard, will issue to the bridge owner an Order to Alter containing details of the alterations

necessary to render navigation through or under the bridge reasonably free, easy, and unobstructed.

(1) *In the case of a railroad or publicly owned highway bridge, an Order to Alter is issued to the bridge owner under the provisions of the Truman-Hobbs Act (33 U.S.C. 511 et seq.). In ordering these alterations, the Coast Guard will give due regard to the necessities of free and unobstructed navigation and of rail and highway traffic.* For alterations to bridges governed by the Truman-Hobbs Act, *the Coast Guard must approve* general plans, specifications, and contracts for the alteration project, as well as approving *the apportionment of the total cost of the alterations between the United States and the bridge owner.*

(2) *For all other bridges, the Order to Alter will contain the required alterations for the bridge and will prescribe a reasonable time in which to accomplish the required alterations. The bridge owner is responsible for the entire cost of the required alterations.* [Emphasis added]

The Truman-Hobbs Act also provides for administrative penalties including fines and removal of the bridge, at the bridge owner's expense, as remedies for a bridge owner's noncompliance with orders issued under the Act. 33 U.S.C. § 519. No fine or other penalty has been levied, or other adverse action initiated, against the Union Pacific for failure to comply with any Truman-Hobbs order.

Section 494 of Title 33 (Chapter 11, *Subchapter I*) governs non-Truman-Hobbs bridge alterations. That section's first sentence grants authority to the Secretary to order alteration or removal of a bridge within a prescribed

time if the bridge "shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed. . . . " Section 495 of Title 33 authorizes the Secretary to levy criminal fines and remove the bridge, enforceable by court injunction, if a bridge owner fails to comply with §§ 491-498 of Title 33.

Section 502 of Title 33 (Chapter 11, *Subchapter I*) grants the Secretary the authority to order alteration of a bridge if the Secretary "shall have good reason to believe that any railroad or other bridge now constructed, or which hereafter may be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters. . . . " Section 502 requires the Secretary to prescribe a time in which the alteration must be completed, and if it is not so completed criminal and/or civil proceedings are to be commenced to levy criminal fines and/or civil penalties.

The Truman-Hobbs Act, at 33 U.S.C. § 522(a) (Chapter 11, *Subchapter II*), provides that the first sentence of § 494 and all of § 502 are "inapplicable with respect to any bridge to which the provisions of this subchapter are applicable. . . . " *Thus, § 494 orders to alter or remove bridges and prescribing the time period allowed to comply are not applicable to Truman-Hobbs bridges carrying railroad traffic, nor are the penalties and fines set out in §§ 494 and 502.* The only penalties or fines an owner of a Truman-Hobbs railroad bridge is subject to are those set out in 33 U.S.C. § 519 for violation of an order issued under *Subchapter II* of Chapter 11. Congress has expressed its intent that time requirements and fines and penalties contained in other federal statutes on bridges found outside *Subchapter II* of Chapter 11 are not to apply to the Clinton Railroad Bridge. When Congress has expressly done this, it

is illogical to contend that Congress secretly intended the enactment of *Subchapter II* to work a penalty on a railroad bridge owner by changing existing judge-made law so as to increase the railroad bridge owner's exposure to financial loss in vessel/bridge allisions.

The United States Supreme Court recognized in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), that damage awards are a form of regulation just like statutes and agency rules. The Court explained in *Garmon* at 359 U.S. 246-247:

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. . . . Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Accord, Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 325-327 (1981) (Iowa state common law damage awards constituted state regulation in conflict with preemptive federal regulatory scheme).

Barge owners choose to run larger barges for financial reasons. This increases the care that must be exercised in transiting the Clinton Railroad Bridge. Every barge owner knows of the necessity of passing through the Clinton Railroad Bridge. If a particular barge tow is too large, or

under-powered, to do so safely, it should not be sent on the voyage. Union Pacific gains no benefit from the use of larger barges, yet it is this modern-day development that resulted in the Truman-Hobbs Order to Alter. Nothing in the Truman-Hobbs Act evidences Congressional intent to penalize railroads for this development in the size of barges using the Mississippi.

The Eighth Circuit Panel's opinion states:

> We find that the Truman-Hobbs Act is a funding statute and not a safety statute. Congress stated that it drafted the Truman-Hobbs Act "to provide an orderly method for the just apportionment of the cost of the reconstruction or alteration of bridges over navigable waters where navigation conditions require such reconstruction or alteration of bridges heretofore built in accordance with law. . . . " House Report No. 1447, August 2, 1939, 76th Cong., 1st Sess.

Union Pacific, 296 F.3d at 674.

The Eighth Circuit Panel's opinion further states:

> Looking at the Truman-Hobbs Act as a whole, a § 512 finding that a bridge is an "unreasonable obstruction to navigation" is not a direct comment on the safety of the bridge. Instead, the Coast Guard labels a bridge an unreasonable obstruction in order to facilitate the funding process. Accordingly, we conclude that the Truman-Hobbs Act does not satisfy the first element of the Pennsylvania rule because it was not drafted to protect marine safety, but to establish a procedure to provide government funds to assist bridge owners in altering their bridges.

Union Pacific, 296 F.3d at 675.

The Coast Guard in issuing a Truman-Hobbs Order to Alter is implementing a legislative policy of facilitating appropriation of federal funds for reconstruction of bridges with no attendant financial penalty to railroads or governmental highway authorities. The Coast Guard's legislative mandate was *not* to decide whether the Clinton Railroad Bridge's 33 U.S.C. § 401 bridge permit should be revoked, thus rendering it vulnerable to a charge that the bridge owner was guilty of negligence in the design, construction or maintenance of the bridge. In carrying out its legislative policy directive, the Coast Guard issues a Truman-Hobbs Order to Alter only if it determines the value of benefits derived by the barge industry from reconstruction will exceed the amount of federal funds expended for the reconstruction. 33 C.F.R. § 116.30(c). In the present case the Coast Guard determined this requirement was met.

The cases cited by Kirby in its petition do not overcome the clear expression by Congress in the Truman-Hobbs Act that the Act is intended to increase federal funding for railroad and highway bridge reconstruction – not to work a change in the common law that will financially penalize railroads and local governments who own bridges spanning navigable waters. For example, the partial sentence Kirby quotes (at page 22 of its petition) from *Bunge Corporation v. M/V Furness Bridge*, 558 F.2d 790, 795 (5th Cir. 1977), is taken out of context. The Fifth Circuit Court of Appeals in the full context of the *Bunge* quote actually sets out the logic that compels placing a heavy burden of proof on a moving vessel striking a stationary object:

II. The Applicable Standard of Care

It is well established that there is a presumption of fault against a moving vessel that strikes a stationary object, such as a dock or navigational aid. Freeport Sulphur Co. v. S/S/ Hermosa, 368 F. Supp. 952, 953 (E.D.La. 1973); Brown & Root Marine Operators, Inc. v. Zapata Off-Shore Co., 377 F.2d 724 (5th Cir. 1967). "In admiralty, this presumption does more than merely require the ship to go forward and produce some evidence on the presumptive matter. The moving vessel must show that it was without fault or that the collision was occasioned by fault of the stationary object or was the result of inevitable accident". [FN3] Paterson Terminals, Inc. v. S/S/ Johannes Frans, 209 F. Supp. 705, 707 (E.D.Pa. 1962), citing Carr v. Hermosa Amusement Corp., Ltd., 137 F.2d 983, 985 (9th Cir. 1943). We have held that "(t)he burden is heavily upon the vessel asserting (the inevitable accident) defense. 'Such vessels "must exhaust every reasonable possibility which the circumstances admit and show that in each they did all that reasonable care required."' " Brown & Root Marine Operators, Inc., supra, 377 F.2d at 726. Furthermore, the presumption of negligence is amply supported by logic and experience:

"The common sense behind the rule makes the burden a heavy one. Such accidents simply do not occur in the ordinary course of things unless the vessel has been mismanaged in some way. It is not sufficient for the respondent to produce witnesses who testify that as soon as the danger became apparent everything possible was done to avoid an accident. The question remains, How then did the collision occur? The answer must be either that, in spite of the testimony of

> the witnesses, what was done was too little or too late or, if not, then the vessel was at fault for being in a position in which an unavoidable collision would occur." *Patterson Oil Terminals v. The Port Covington*, 109 F. Supp. 953, 956 (E.D. Pa. 1952).

558 F.2d at 794-795.

In *Board of Commissioners of the Port of New Orleans v. Gypsum Transportation Limited*, 263 So.2d 385 (La. Ct. App. 1972), *writ denied*, 266 So.2d 442 (La. 1972) (cited at pages 19 and 26 of Kirby's petition), a vessel struck a bridge that had never obtained a 33 U.S.C. § 401 permit. The court held that failure to secure a § 401 permit did not trigger application of the *Pennsylvania rule*. 263 So.2d at 389-390. The court in *Board of Commissioners* explained at 263 So.2d 390:

> In our opinion 33 U.S.C. § 401 is not directly designed to prevent allisions, but rather to give the government power of approval and supervision of structures which could constitute a hazard to navigation if improperly constructed or maintained. Violation of this statute by failing to obtain a permit does not necessarily result in a hazard to navigation, as would violation of a statute by failing to sound a fog horn or failing to exhibit proper lights.

In the present case Union Pacific had the 33 U.S.C. § 401 permit required by the Rivers and Harbors Act. The rationale of the *Board of Commissioners* court certainly would not lead to a conclusion that a Truman-Hobbs Act order to alter under 33 U.S.C. § 513 triggers application of the *Pennsylvania rule*. That court's reference in *dicta* to 33 U.S.C. § 512, rather than to 33 U.S.C. § 494 (which contains the same prohibition set out in § 512), was simply a

mistake by a court that did not fully understand the difference in the statutory scheme enacted in Subchapter I of Chapter 11 of Title 33 compared to the statutory scheme enacted in Subchapter II of Chapter 11 of Title 33 (Truman-Hobbs Act).[1]

In *State of Connecticut v. Tug Cynthia Moran*, 607 F. Supp. 24 (D. Conn. 1984) (Kirby petition, page 19, n.3), a railroad's bridge was not opened in time to allow a barge tow to pass. The court held this was a violation of its statutory duty to open the bridge in a timely manner, citing 33 U.S.C. § 494 and § 499 (drawbridge regulation), and 33 CFR § 117.125(b). 607 F. Supp. at 29 and n.1. The *Cynthia Moran* court also erroneously cited 33 U.S.C. § 512. *Id.*, at 29. Section 512 has nothing to do with failure to timely open a draw. The court in *Tug Cynthia Moran* did not even rely on the *Pennsylvania* presumption because it said the railroad's active negligence was the sole proximate cause as a matter of law. *Id.*, at 29, n.1.

The court in *Folkstone Maritime, Limited v. CSX Corporation*, 64 F.3d 1037 (7th Cir. 1995) (Kirby petition at page 23), cited 33 U.S.C. § 491; but it also erroneously cited 33 U.S.C. § 512, part of the Truman-Hobbs Act, instead of 33 U.S.C. § 494. Section 494 provides that "No bridge erected or maintained under the provisions of sections 491 to 498 of this title, shall at any time

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[1] Sections 401, 403 and 406 of Title 33 were enacted as part of the "Rivers and Harbors Act of 1899". Sections 491-498 of Title 33 were enacted as the "Bridge Act of 1906". Those two Acts are in Subchapter I of Chapter 11. The Truman-Hobbs Act, 33 U.S.C. §§ 511-524, was enacted in 1941 (§ 524 was added by amendment in 1952 to clarify application of the Administrative Procedures Act), and forms Subchapter II of Chapter II of Title 33.

unreasonably obstruct the free navigation of the waters over which it is constructed. . . ." Section 491 provides that a bridge permit is required for construction or alteration of a bridge over navigable waters. These sections govern non-Truman-Hobbs bridges. *See*, 33 U.S.C. § 522(a). The bridge in *Folkstone* was not a Truman-Hobbs bridge, as no Truman-Hobbs order to alter had issued. (*See* the Seventh Circuit's description of the history of the bridge at 64 F.3d 1043-1045, and the district court's more detailed history in *Folkstone Maritime, Limited v. CSX Corporation*, 1994 WL 96670, pp. 4, 12-13 (N. D. Ill. 1994)). The sole proximate cause of the allision in *Folkstone* was the bridge owner's negligent failure to maintain the bridge so it would open to 83 degrees as required by its § 491 permit. 64 F.3d at 1048-1049; 1994 WL 96670 at p. 13-15. Placing the burden of proof on the bridge owner in *Folkstone* resulted because of a failure to comply with the draw opening requirements of a § 491 permit – not because of the design or construction of a bridge operating according to the terms of a valid § 491 permit that has now become more difficult to navigate because barge owners have chosen to use much larger barges.

The *Folkstone* Seventh Circuit panel in fact applied the *Oregon* rule "that there is a presumption of fault against a moving vessel that allides with a stationary object." 64 F.3d at 1050; *see*, *Arkansas State Highway Commission v. Arkansas River Company*, 271 F.3d 753, 757 (8th Cir. 2001) (citing *Folkstone* for application of the *Oregon* rule). The *Folkstone* court also, however, explained that ". . . courts have recognized that, as a matter of pragmatic necessity, the *Oregon* rule is not susceptible to rigid application in the case of a drawbridge" 64 F.3d at 1050-1051. The court found no evidence of negligence on the part of the vessel and concluded: "Sufficient evidence

was presented by [the vessel] to overcome the presumption of fault when a moving vessel allides with a stationary object." 64 F.3d at 1055.

In *Nassau County Bridge Authority v. Tug Dorothy McAllister*, 207 F. Supp. 167 (E.D.N.Y. 1962), *affirmed*, 315 F.2d 631 (2nd Cir. 1963) (Kirby petition at page 27), the cause of the allision was the active negligence of the bridge operator who failed to timely signal the vessel that the draw would not be opened, in violation of 33 U.S.C. §§ 494 and 499. *Id.*, at 207 F. Supp. 170-171, 174. The court erroneously cited § 512 since no Truman-Hobbs order to alter had been issued. 207 F. Supp. at 171, 174. The Second Circuit held: "Affirmed on the opinion of Judge Abruzzo in concluding that the damage was caused solely by failure of the bridge tender to give a timely danger signal." 315 F.2d 631. The *Nassau* court in fact said there was no evidence the "bridge had not been maintained in proper operable condition." 207 F. Supp at 174.

In *Illinois Constructors Corp. v. Logan Transportation, Inc.*, 715 F. Supp. 872 (N.D. Ill. 1989) (Kirby petition at page 18), a vessel struck a cofferdam, which is a water-tight enclosure built into the riverbed and then pumped dry to facilitate construction of a bridge pier. The Coast Guard construction permit guidelines mandated certain lights and reflective tape to illuminate the cofferdam. 715 F. Supp. at 877. The court applied the *Oregon* rule placing the burden of proof on the vessel colliding with a stationary object. 715 F. Supp. at 879. The court then said, ". . . if any party violates a statutory or regulatory rule designed to prevent collisions, that party is guilty of per se negligence and, under the so-called '*Pennsylvania* rule,' has the burden of proving that its statutory fault was not a contributing cause of the accident. . . ."

The Court in *Illinois Constructors* then explained its analysis further at 715 F. Supp. 881:

> Both parties agree that ICC has established a prima facie case of negligence, since under the *Oregon* rule the *M/V Sunshine* is deemed to be presumptively at fault for striking the stationary structure. Moreover, both sides also agree (and this court finds) that Captain Williams was actually negligent in piloting the vessel, causing it to run aground on the sandbar and, ultimately, to strike the cofferdam.
>
> As the pilot, Williams was chargeable with knowledge of all navigational conditions reasonably ascertainable by mariners experienced in navigating a particular waterway. . . .
>
> Thus, not only has the plaintiff established a prima facie case of negligence, but the defendant concedes that Captain Williams negligently navigated the vessel. The issue, then, is whether ICC itself was negligent and whether its negligence should reduce its recovery.

The court then said the company building the pier had a duty to comply with the Coast Guard lighting guidelines and if its failure to do so contributed to the cause of the allision it would be contributory negligence. *Id.* The court, however, found no violation of Coast Guard guidelines was a cause of the allision. *Id.*, at 882. The *Illinois Constructors* court thus found the *Oregon* presumption applicable and the case supports the Union Pacific's position.

Thus, the cases cited by Kirby do not correctly address the statutory intent of Congress in enacting the Truman-Hobbs Act. The Act was intended to allow a federal subsidy for the barge industry by way of bridge reconstruction, and

to do so without adverse financial consequences to railroads and highway authorities. The Act was not intended to change longstanding judge-made law governing jury instructions at trials on vessel/bridge allisions.

CONCLUSION – RELIEF REQUESTED

Petitioner Kirby's petition for a writ of certiorari should be denied. Alternatively, if Kirby's petition is granted,

(1) an order of summary disposition on the merits should be entered under Rule 16 affirming the judgment below of the Eighth Circuit Court of Appeals on the *Oregon* issue; and

(2) Union Pacific's cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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33 U.S.C. 491. Approval of and deviation from plans; exemptions

When, after March 23, 1906, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of Transportation for the Secretary's approval, nor until the Secretary shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of sections 491 to 498 of this title, have been approved by the Secretary it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Secretary. This section shall not apply to any bridge over waters which are not subject to the ebb and flow of the tide and which are not used and are not susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.

33 U.S.C. § 495. Violations of orders respecting bridges and accessory works

(a) Criminal penalties for violation; misdemeanor; fine; new offenses; jurisdiction: suits for recovery of removal expenses, enforcement of removal, and obstruction-to-navigation causes or questions

Any persons who shall willfully fail or refuse to comply with the lawful order of the Secretary of Transportation or the Chief of Engineers, made in accordance with the provisions of sections 491 to 498 of this title, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished in any court of competent jurisdiction by a fine not exceeding $5,000, and every month such persons shall remain in default shall be deemed a new offense and subject such persons to additional penalties therefor; and in addition to the penalties above described the Secretary of Transportation and the Chief of Engineers may, upon refusal of the persons owning or controlling any such bridge and accessory works to comply with any lawful order issued by the Secretary of Transportation or Chief of Engineers in regard thereto, cause the removal of such bridge and accessory works at the expense of the persons owning or controlling such bridge, and suit for such expense may be brought in the name of the United States against such persons, and recovery had for such expense in any court of competent jurisdiction; and the removal of any structures erected or maintained in violation of the provisions of said sections, or the order or direction of the Secretary of Transportation or Chief of Engineers made in pursuance thereof may be enforced by injunction, mandamus, or other summary process, upon application to the district court in the district in which such structure may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States at the request of the Secretary of Transportation; and in case of any litigation arising from any obstruction or alleged obstruction to navigation created by the construction of any bridge under said sections, the cause or question arising may be tried before the district court of the United States in

any district which any portion of said obstruction or bridge touches.

(b) Civil penalties for violation; separate offenses; notice and hearing; assessment, collection, and remission; civil actions

Whoever violates any provision of sections 491 to 498 of this title, or any order issued under sections 491 to 498 of this title, shall be liable to a civil penalty of not more than $1,000. Each day a violation continues shall be deemed a separate offense. No penalty may be assessed under this subsection until the person charged is given notice and an opportunity for a hearing on the charge. The Secretary of Transportation may assess and collect any civil penalty incurred under this subsection and, in his discretion, may remit, mitigate, or compromise any penalty until the matter is referred to the Attorney General. If a person against whom a civil penalty is assessed under this subsection fails to pay that penalty, an action may be commenced in the district court of the United States for any district in which the violation occurs for such penalty.

33 CFR § 116.30 Chief, Office of Bridge Administration Review and Evaluation.

(a) Upon receiving a Detailed Investigation Report from a District Commander, the Chief, Office of Bridge Administration will review all the information and make a final determination of whether or not the bridge is an unreasonable obstruction to navigation and, if so, whether to issue an Order to Alter. This determination will be accompanied by a supporting written Decision Analysis which will include a Benefit/Cost Analysis, including calculation of a Benefit/Cost Ratio.

(b) The Benefit/Cost Ratio is calculated by dividing the annualized navigation benefit of the proposed bridge alteration by the annualized government share of the cost of the alteration.

(c) Except for a bridge which is statutorily determined to be an unreasonable obstruction, an Order to Alter will not be issued under the Truman-Hobbs Act unless the ratio is at least 1:1.

(d) If a bridge is statutorily determined to unreasonably obstruct navigation, the Chief, Office of Bridge Administration will prepare a Decision Analysis to document and provide details of the required vertical and horizontal clearances and the reasons alterations are necessary.

(e) If the Chief, Office of Bridge Administration decides to recommend that the Commandant issue an Order to Alter, or a bridge is statutorily determined to unreasonably obstruct navigation, the Chief, Office of Bridge Administration will issue a letter to the bridge owner ("The 60-Day Letter") at least 60 days before the Commandant issues an Order to Alter. This letter will contain the reasons an alteration is necessary, the proposed alteration, and, in the case of a Truman-Hobbs bridge, an estimate of the total project cost and the bridge owner's share.

(f) If the bridge owner does not agree with the terms proposed in the 60-Day Letter, the owner may request a reevaluation of the terms. The request for a reevaluation must be in writing, and identify the terms for which reevaluation is requested. The request may provide additional information not previously presented.

(g) Upon receipt of the bridge owner's response, the Chief, Office of Bridge Administration will reevaluate the situation based on the additional information

submitted by the bridge owner. If after the Chief, Office of Bridge Administration reviews the determination, there is no change, the Commandant may issue an Order to Alter as set out in § 116.35. The Chief, Office of Bridge Administration's determination based on the reevaluation will constitute final agency action.

Supreme Court U.S.
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No. 02-739

In the
Supreme Court of the United States

KIRBY INLAND MARINE, INC. OF MISSISSIPPI, f/k/a BRENT TRANSPORTATION COMPANY, *in personam* and the M/V MISS DIXIE, its engines, tackle, fixtures and appurtenances, etc., *in rem*,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO ~~BRIEF IN OPPOSITION~~

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, petitioner respectfully addresses new points raised in the Brief in Opposition.

PRELIMINARY STATEMENT

Even a cursory review of the Union Pacific Railroad Company's ("Union Pacific") Brief in Opposition confirms the gravamen of what Kirby Inland Marine ("Kirby") sought to establish in its Petition for Writ of *Certiorari*—there exists a general state of confusion among the lower courts about how to interpret and when to apply 33 U.S.C. § 512. Therefore, instead of replying point by point to the issues raised in Union Pacific's Brief in Opposition, Kirby will stand on its original Petition for Writ of *Certiorari* and only reply to the few new assertions that merit a specific response.

This reply will therefore focus on the railroad's determined effort to wrongly interpret *I&M Rail Link, LLC v. Northstar Navigation, Inc.*, 198 F.3d 1012 (7th Cir. 1995) in a manner it claims is consistent with *Union Pacific Railroad Company v. Kirby Inland Marine, Inc.*, 296 F.3d 671 (8th Cir. 2002). In addition, Kirby will address Union Pacific's incorrect contention that its railroad bridge has no obligation to accommodate the needs of modern commercial navigation beyond compliance with its original permit. Finally, Kirby will reply to the Union Pacific's mistaken assertions that the railroad would be financially punished if the *Oregon* presumption (158 U.S. 186) were found not to apply and that the Truman-Hobbs Act should be interpreted in a manner that does not change the burden of proof applicable under the presumption.

I. Union Pacific's response acknowledges a conflict between the Seventh and Eighth Circuit Courts of Appeals.

While Union Pacific is quick to maintain that there is no conflict between the Seventh and Eighth Circuit Courts of Appeals, its Brief in Opposition, in fact, acknowledges just such a conflict. Indeed, Union Pacific specifically asserts that in *Folkstone Mar. Ltd. v. CSX Corp.*, 64 F.3d 1037 (7th Cir. 1995), the Seventh Circuit "erroneously cited 33 U.S.C. § 512." (*See* Union Pacific's Brief in Opposition at page 17). In other words, in its skewed defense of the *Union Pacific* decision below, the railroad argues on one hand that *Folkstone* was wrongly decided and on the other that there is no conflict between the two circuits.

However, the Seventh Circuit cited to 33 U.S.C. § 512 in both *I&M* (198 F.3d at 1013) and *Folkstone* (64 F.3d at 1048) because under the jurisprudence of that circuit the statute is not merely a step in a funding process but also the source of an affirmative duty on all bridge owners not to unreasonably obstruct navigation.[1] It is this fundamental belief that is reflected in both *I&M* and *Folkstone* that cannot be reconciled with the *Union Pacific* decision. Accordingly, to defend *Union Pacific* by claiming the decision is consistent with *I&M* and to simultaneously claim that *Folkstone* was wrongly decided is disingenuous.

It should also be noted that Union Pacific expressly concedes that decisions of courts in jurisdictions other than the Seventh Circuit Court of Appeals also directly conflict with the Eighth Circuit Court of Appeals' interpretation of

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[1] Indeed, in *I&M*, the Seventh Circuit Court of Appeals even cited to *Folkstone* for the proposition that "findings in the Coast Guard's report are more than adequate to overcome *The Oregon's* presumption." *I&M*, 198 F.3d at 1016.

33 U.S.C. § 512. These decisions include: *Nassau County Bridge Authority v. Tug Dorothy McAllister*, 207 F.Supp. 167 (E.D.N.Y. 1962) *affirmed* 315 F.2d 631 (2d Cir. 1963); *Port of New Orleans v. Gypsum Transportation Limited*, 263 So.2nd 385 (La. Ct. App. 1972); and *State of Connecticut v. Tug Cynthia Moran*, 607 F.Supp. 24 (D.Conn. 1984). Accordingly, in addition to resolving the clear conflict between the Seventh and Eighth Circuit Courts of Appeals, Kirby respectfully suggests that this Court grant the petition to clarify confusion that exists throughout the country.

II. Union Pacific misinterprets the *I&M* decision on Petition for Rehearing.

Union Pacific also claims that the decision of the *I&M* court on Petition for Rehearing (205 F.3d 333) supports its assertion that the original *I&M* decision of the Seventh Circuit Court of Appeals (198 F.3d 1012) did not find that the Coast Guard's Order to Alter had an effect on the application of the *Oregon* presumption of fault against Kirby. (*See* Union Pacific's Brief in Opposition at page 4). However, there is nothing in the decision on the Petition for Rehearing to support this claim.

Initially, as I&M Rail Link's arguments in the Petition for Rehearing clearly indicate, the railroad in that case understood very well that the underlying decision of the Seventh Circuit Court of Appeals (198 F.3d 1012) had a direct effect on the *Oregon* presumption. In fact, summarizing the railroad's legal citations in the Petition for Rehearing, the Seventh Circuit Court of Appeals noted:

> According to I&M Rail Link, each of these cases stands for the proposition that the Coast Guard's finding under the Truman-Hobbs Bridge Act of 1940, 33 U.S.C. §§ 511-23 that a bridge poses an

> 'unreasonable hazard to navigation' must be ignored in admiralty litigation, *and in particular that such a finding does not affect the rule of The Oregon, 158 U.S. 186, 192-93, 15 S.Ct. 804, 39 L.Ed. 943 (1895), that the moving vessel is presumptively at fault in any allision.*

I&M, 205 F.3d at 334. (Emphasis added).

Nevertheless, Union Pacific quotes a portion of the *I&M* decision on Petition for Remand that includes the following statement:

> We reached the same conclusion: the facts underlying the Coast Guard's decisions concerning the Sabula Bridge imply that shortcomings in its design may have played a causal role in the allision, but whether this is so (indeed, whether the design is deficient) is for the trier of fact.

I&M, 205 F.3d at 335. (*See* Union Pacific's Brief in Opposition at page 4). Union Pacific asserts that this statement somehow supports its position that the *Oregon* presumption applies and that the towboat company would still bear the burden of proof at trial. However, in light of the *I&M* court's earlier holdings, it is instead clear that this quotation merely confirms that any trial would proceed with no presumption applying against either party.

Indeed, describing how the facts at trial might develop, the *I&M* court previously held:

> Perhaps [the pilot] should have reversed the MEGAN BEESECKER's engines rather than attempting to use the Illinois channel; perhaps he blundered earlier when using the current to line up for the transit; but perhaps this was one of the allisions that are to be expected given the clash between an 1880 design and the nature of modern

> traffic on the Mississippi. [Citations omitted]. *The trier of fact must give an answer without resort to presumptions.*

I&M, 198 F.3d at 1016. (Emphasis added). Accordingly, despite the Union Pacific's self-serving efforts, there is no room here for a revisionist rewrite of *I&M*.

Indeed, even the Eighth Circuit Court of Appeals unequivocally acknowledged the conflict. In its decision below, the Eighth Circuit Court of Appeals stated, "to the extent that the *I&M Rail Link* case can be interpreted to hold that a Coast Guard's Order to Alter rebuts and overcomes the *Oregon* presumption, as a matter of law, we respectfully disagree." *Union Pacific*, 296 F.3d at 678.

III. Union Pacific also misinterprets the *I&M* decision on remand.

Similarly, Union Pacific, as did the Eighth Circuit Court of Appeals (296 F.3d at 677-678), misinterprets the *I&M* district court's decision that followed remand. *See I&M*, 2001 WL 460028. The decision on remand had nothing to do with the application of a presumption. Indeed, the opinion instead expressly states, "in this order, the court addresses various motions *in limine* filed by both sides, along with I&M's Waiver of Jury Demand." *Id.* at 1. (Emphasis in original).

In a section of the decision entitled "I&M's Motion to Exclude Evidence of Other Similar Accidents," the district court addressed the issue of whether evidence of other allisions with the bridge would be admissible at trial. *Id.* at 3-5. In this analysis, the district court noted that the Seventh Circuit Court of Appeals had referred to prior allisions and Coast Guard reports in its earlier opinion regarding the *Oregon* presumption. *Id.* at 4. The district

court concluded that while the appellate court did find that the Coast Guard reports and evidence of prior allisions was relevant to the issue of whether the *Oregon* presumption applied, said finding did not have an impact on the issue of whether prior allisions were substantially similar enough to be admitted into evidence. *Id.*

It is difficult to understand what relevance the *I&M* district court's decision on remand has to the issues being presented to this Court. Indeed, the district court merely stated that the issue of whether Coast Guard reports and evidence of prior allisions could affect the application of the *Oregon* presumption is entirely different from and had no bearing on the issue it was addressing at the time, whether particular evidence should be admitted at trial. Accordingly, the *I&M* district court said nothing new about the application of the presumption and the citation to the district court's decision on remand by both Union Pacific and the Eighth Circuit Court of Appeals is therefore without merit.

IV. The Union Pacific's duty not to unreasonably obstruct navigation is dynamic.

The gist of Union Pacific's Brief in Opposition is that because its bridge was constructed under a valid permit, albeit at the beginning of the last century, it has no responsibility to ever conform to the needs of modern commercial navigation. This assertion is simply false. Initially, as reported in the Detailed Report of the United States Coast Guard that was prepared pursuant to 33 C.F.R. § 116.20, "when the bridge was originally built in 1888 and modified in 1907 it was conditional on the rebuilding of the bridge

when required by navigational interests."[2] In addition, "all bridges are obstructions to navigation and are tolerated only as long as they serve the needs of land transportation while allowing for the reasonable needs of navigation." 33 C.F.R. § 116.01(a).[3] Accordingly, contrary to the assertion of the railroad, the Union Pacific's duty is dynamic, as it must change its bridge with the times and the paramount needs of navigation.

V. The Union Pacific would not be financially penalized if this Court leveled the playing field.

Union Pacific asserts that it would be financially penalized if the *Oregon* presumption was found not to apply against vessels that strike bridges that have been found to be unreasonable obstructions to navigation. However, if it were held that the *Oregon* presumption did not apply to such a bridge or if this Court found that the Coast Guard's Order to Alter triggered the *Pennsylvania* rule (86 U.S. 125) and thereby rebutted the *Oregon* presumption, as a matter of law, the only result would be that a trial would proceed like any other case—with plaintiff bearing the burden of proof. Such an outcome can hardly be described as financial punishment.

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[2] This fact was mentioned in Kirby's Writ of *Certiorari* and was not disputed in the Union Pacific's brief. *See* Supreme Court Rule 15.2.

[3] *See also S.C. Loveland, Inc. v. East West Towing, Inc.*, 608 F.2d 160, 165 (5th Cir. 1979) ("Bridges are obstructions to navigation and the right of navigation is paramount, land traffic is subservient.").

VI. The federal government prohibited unreasonable obstructions to navigation before the *Oregon* presumption came into being.

Union Pacific also asserts that because the Truman-Hobbs Act was enacted after *The Oregon,* 158 U.S. 186, 15 S.Ct. 804 (1895) was decided, 33 U.S.C. § 512 must be read in a manner that does not alter application of the presumption. However, the federal government has been prohibiting the unreasonable obstruction of navigable waters since at least 1884. *See* 23 Stat. at L. 133, 148 chap. 229. Accordingly, Union Pacific's sequence of events is wrong. What is significant about the Truman-Hobbs Act in this context is that while it provides a method for bridge operators to obtain federal assistance in altering their bridges, it evidences no intent to shield them from liability if a bridge becomes an unreasonable obstruction to navigation. In short, the railroad has failed to establish (and Kirby submits that it cannot establish) that this Court meant for the presumption of negligence to apply even in those cases where the bridge was previously determined to be an unreasonable obstruction to navigation.

CONCLUSION

The important issues presented to this Court, which are intimately related to prior Supreme Court precedent, federal legislation, and interstate commerce have been dealt with in a conflicting manner by the various courts that have considered them. Because of the inconsistency among these courts, neither the railroad industry nor the maritime industry has a clear understanding of the applicable law. The decision below has further confused this area of law. For all of the reasons stated in Kirby's Writ of *Certiorari* and in this Reply, the petition should be granted.

Respectfully submitted,

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